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ABSTRACT

Volume 2 of a 4-volume bilingual bicultural law-related curriculum deals with the evolution of a Navajo legal system. Navajo "law" was referred to by Navajos as "religion", thus Anglos viewed the Navajo as having no "law." Because of the complexity of this topic, it is suggested that the first sections covering this view be read and digested by teachers and professionals only, who then convey sufficient information to give the student a flavor of Navajor law, thus laying the basis for discussions of other units that focus on specific disputes. Among subjects covered in the first section are: Anglo influence on Navajo law; the Indian Bill of Rights; Navajo torts; "Navajo Legal Vocabulary: A Critical Analysis" defines and compares Navajo and Anglo terms such as law; the system and its players--a Navajo view; the parties and their functions; and roles (judge, jury, police). The third section deals with legal institutions and roles on the reservation as they have evolved, such as the: Navajo Tribal Police; courts and judges (including an interview with The Honorable Judge Tom B. Becenti, Courts of the Navajo Tribe); and role of the lay advocate (which includes interviews with Peterson Zah and Leonard B. Jimson). It is suggested that teachers have the students read and discuss the interview section. (AH)

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The Law of The People

DINÉ BIBEE HAZ'ÁANII

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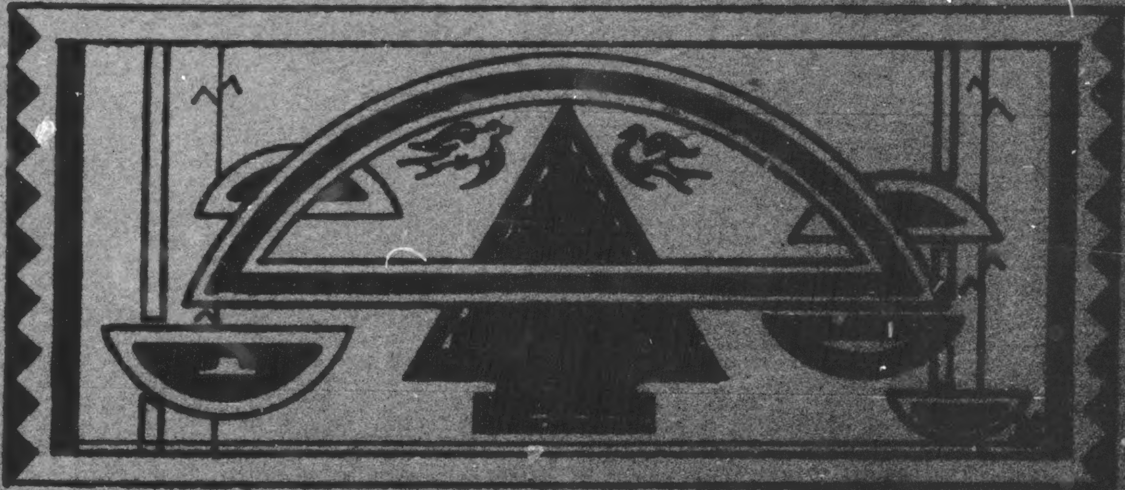

BY
DAN VICENTI
LEONARD B. JIMSON
STEPHEN CONN
M.J.L. KELLOGG

VOLUME II

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RAMAH NAVAJO HIGH SCHOOL PR

THE LAW OF THE PEOPLE

DINÉ BIBEE HAZ'ÁANII

A Bicultural Approach to Legal Education
for Navajo Students

by Dan Vicenti
Leonard B. Jimson
Stephen Conn
M. J. L. Kellogg

RAMAH NAVAJO HIGH SCHOOL PRESS

Ramah, New Mexico 87321

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Executive Office of the Chairman

THE NAVAJO NATION

Window Rock, Arizona, 86515

PETER MACDONALD
Chairman

FOREWORD

The Navajo people have long been ensnared in a legal web. Contact with the Anglo-American economic system which has become necessary for the Navajo people has brought a concomitant involvement in the confusing and, often contradictory, Anglo legal system. The Anglo legal system, for instance, in the areas relating to commercial transactions, has many aspects that are substantially different from the simple and effective traditional norms which have served the Navajo people extremely well for hundreds of years.

As a result of this confluence of legal systems, many Navajo people are at a serious disadvantage in dealing with Anglo merchants, car dealers and traders. In their dealings with these Anglo businessmen, most of the Navajo people are unaware of the pitfalls and the protections that are present in the Anglo -American legal and commercial systems.

It becomes increasingly important that the Navajo people understand the Anglo system and its relationship to our traditional Navajo "common law". To a large extent, the responsibility for acquainting all of our people with these matters rest with our young people. This excellent textbook clearly and simply shows many of the problems and difficulties which face the Navajo people when they deal in the Anglo system. It also indicates effective means for countering these dangers, and outlines the protections afforded by the Anglo legal system. This text and the course of study it envisions are important additions to our educational systems. I commend this instruction and I am confident that it will prove of great benefit to the students and to all Navajo people.

Peter MacDonald, Chairman
Navajo Tribal Council

INTRODUCTION

This book is intended to be a source book of the traditional and modern law that affects Navajo people today.

It is hoped that teachers will use it as the basic instructional text in classes on legal education and Navajo culture in secondary schools and colleges.

Furthermore, we believe that it will serve as a useful text for lay judges, lay advocates, police, social workers, and other people who deal with Navajo people and their problems. We believe that the material in this text will give these people new insights into Navajo social and business relationships, and especially the impact of law and tradition upon those relationships.

The paraprofessional advocate is taking on new roles in the Navajo Nation and in other Indian court systems. He will not only represent clients in court, but will help to conciliate their disputes. He will also enter the classroom and assist teachers in instruction about modern law, traditional legal ideas, and the problems of students and their parents.

For paraprofessionals of other cultural traditions, this text and the methodological approaches embodied in the interviews published here will direct them in the better performance of their present tasks and in the assumption of roles that are uniquely theirs.

Stephen Conn
Consulting Attorney

THE DEVELOPMENT OF A NAVAJO LEGAL SYSTEM

A. The Evolution of Law on the Reservation

B. Navajo Legal Vocabulary: A Critical Analysis

C. Legal Institutions and Roles on the Reservation

    The Navajo Tribal Police

    The Courts and Judges; including an interview with The Honorable Judge Tom B. Becenti, Courts of the Navajo Tribe

    The Role of the Lay Advocate; including interviews with Peterson Zah and Leonard B. Jimson

DEVELOPMENT OF LAW FOR THE NAVAJO PEOPLE

The evolution of the formal legal system for the Navajo People and for other Indian peoples has been set within a special framework of encounters with white military force and the white man's special view of Indians.

The first section of this unit on the development of law and legal institutions will describe through the writings and speeches of Anglos and Indians exactly how these people felt Navajo people should relate to Anglo law.

A concluding portion of this first section will show how Navajo language has oft times embodied certain important misinterpretations of the Anglo-American tradition. These distortions in language affect every Navajo-speaking person who must rely upon an interpreter when he seeks legal help for his problem or when he seeks to defend himself in court.

It is suggested that teachers and other professionals only read and digest the analyses of law in this section. Students may be drawn into these analyses when they read the transcripts of interviews with Navajo judges and advocates in the second section of this unit. The material contained here is necessarily more difficult than the unit on consumer law. If the teacher is able to convey sufficient information to give the student the flavor of Navajo law as it has evolved, he has succeeded in laying the basis for useful discussions of the other units that focus on specific disputes as, for example, the third unit, on family law and family disputes.

Meacham replied that the Modocs could not stay in peace in the Lava Beds unless they gave up the men who committed the killings on Lost River. They would be treated fairly, he promised, in a court of law.

"Who will try them" Jack asked. "White men or Indians?"

"White men, of course," Meacham admitted.

"Then will you give up the men who killed the Indian women and children on Lost River, to be tried by the Modocs?"

Meacham shook his head. "The Modoc law is dead; the white man's law rules the country now; only one law lives at a time."

"Will you try the men who fired on my people?" Jack continued. "By your own law?"

Meacham knew and Captain Jack knew that this could not be done. "The white man's law rules the country," the commissioner repeated. "The Indian law is dead."

"The white man's laws are good for the white men," Jack said, "but they are made so as to leave the Indian out."[1]

NAVAJO LAW AND ANGLO LAW

The Anglo-American learns about law from his history, his own experience, and in the classroom. He views justice as a balance between the rights of the whole society and the rights of individuals. The laws are the tools to preserve this balance.

The Anglo law that came to the Navajo people came as part of the punishment of Bosque Redondo to a captive people. The Navajos who took the Long Walk and who were punished by the military and the Indian Agents did not learn about law in a civics course or happy manner. Although the English had preserved basic individual rights in their Bill of Rights and the Americans had drafted their own document that protected the rights of individuals against a big and powerful government, the Navajos learned from bitter experience how many were the rights they had.

The law that came to them was the law of force. The only "rights" they were granted as a captured people were given to them by white military commanders and government employees as favors. It is important to see that Navajo people, who had very clear ideas about treating each other with respect, came to understand what the white man's law meant. It is not surprising that they saw the law as a kind of punishment and something to be avoided, and not a tool to protect them. This was exactly the kind of "law" that the Navajos received. There was no balance, no justice.

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[1] Brown, Dee. Bury My Heart at Wounded Knee: An Indian History of the American West. New York: Holt, Rinehart & Winston, 1970. p.232.

It is strange to think that the white man considered the Navajo to be "uncivilized" and his world to be governed by "anarchy." The white man did not understand Navajo law because Navajo people did not call it law, but, rather, religion. It was not written down. It was closer to daily lives than law because everyone was trained in it, not just lawyers. People knew how to behave and there were always people who could set things right and point out the right way. Even today, many whites and even some Navajos who have forgotten their own ways think that the only law to guide Navajo people is that which is borrowed from white man's law. One purpose of this course is to show that there is an important Navajo heritage that shows people how to behave and solve problems. It is important because people still live by it and resolve their problems according to its guidelines.

But first, let us review Anglo law as the Navajo people first met it and the people who applied it.

> "The question of the treatment of Indians under certain conditions is a very serious one: the mere technical definition of the rights of any person under the law is always subordinate to the question of preserving the social order. The householder who kills a burglar found in his home at midnight may exceed his strict legal authority in the premises, but if the burglar class were once given to understand, through the benevolent ministrations of some Society for the Suppression of the Use of Firearms, that they could safely continue to pursue their calling till one of their victims could capture them alive, bring them into a court room, and prove by an irreproachable array of witnesses that they were engaged in a form of offending for which the statutes would justify their destruction, how long would life be worth living in any civilized community? More intense becomes the interest in such questions where the community is sparse, courts and prisons remote, and the machinery of justice compelled to cope with so many problems of self-preservation in the centers of white population as to leave little time

for dealing with matters affecting non-citizens and non-tax paying Indians.

"A general law gives the Commissioner of Indian Affairs a pretty wide sway in handling such questions, and the interpretation I have always given to my duty, when it came to protecting Indians from the possible rapacity of their white neighbors, is that I am to look out to the rights of the Indians--always, of course, following lines of practical justice--and trust the white citizen who feels aggrieved at my course to seek his remedy by the same processes he would apply against other white men who had done him a damage. When it comes to handling Indians who have been preying upon other Indians, if all parties have reached a stage of civilization where they understand the meaning of civil justice and the purposes of courts and permanent law, my plan has been to explain to them their respective rights and privileges, and encourage them to thresh their difficulties out in the same way that white persons do. If they are still in a state of barbarism, [emphasis added] I try to deal out justice as well as I know how. If, in the course of events, the offenders attempt violence, they are taught the unwisdom of such a resort, not by cruelty, but by humane though firm measures which will prevent their continuing in their evil courses, teach them a better way of life, and impress them with a sense of the magnitude and the power of the Government they are defying. If 'the proof of the pudding is in the eating,' then this policy must be a success.

"As nearly as I can find out, the chief reliance of those persons who criticize the disposal of the By-a-lil-le outlaw gang is upon the decision in the Ponca case some thirty years ago. In this case, on writs of habeas corpus, certain Indians were released from the confinement into which they had been cast for presuming to leave a new reservation to which they had recently been removed. I may say, in the first place, that the world has advanced a whole generation since then, and Indians are no longer, peaceful and unoffending, carted about from reservation to reservation and confined where placed; and one of the great efforts I have made since I became Commissioner has been to encourage Indians to leave their reservations and go out into the world and live there, as long as they conducted themselves properly. Indeed, I have been breaking up reservations as fast as I could, so that there might soon be none to which Indians could be confined.

"But the By-a-lil-le gang were not the Poncas, either in development or conduct. No court has ever passed upon a case like theirs, hence in dealing with it I had to fall back upon my knowledge of Indians generally, my investigation of the performances of these Indians in particular, and my common sense. May, more, there is no certainty that if the Ponca case had ever been brought before the Supreme Court of the United States--which, from the conditions, was impossible--the court of first instance would have been upheld in its conclusion of law.

"I am, as I have already said, eager to have every open question with regard to the status of the Indian tried out and settled by a competent judicial authority. On only two grounds did I regret the raising of the issue in the By-a-lil-le case: first, because habeas corpus proceedings in an inferior court settle no question permanently; second, because, if the decision in these cases should be decided adversely to the Government, every freebooter on a closed Indian reservation would be encouraged thereby to do whatever he pleased, and the teachings of medicine men like the leader of of this band, that the Government has been paralyzed by his "medicine," would be accepted by the superstitious Indians as proven truth. If the same issue could have been raised under some other conditions more favorable to good results, I should have been only too glad to join in expediting the test.

"This episode, serious as it may be in one phase, is not without its humors, one of which is the attempt to make me out an enemy of human liberty because I have been instrumental in shutting up evil-doers in order that right-doers may have a chance to live in peace. *Whether I love liberty may be guessed from the fact that I never would own a dog which had to be chained or muzzled, or let a bird or a squirrel or any other live pet be kept in a cage on any premises which belonged to me. But if I see a vicious cur running at large and biting unoffending persons, or a jackal playing havoc with my farm stock, I have no sentimental compunctions about taking a liberty in turn with the marauder and putting him out of commission*. [Emphasis added]

"Now that the By-a-lil-le case has got into the courts, we can all afford to wait and see what happens: and meanwhile neither bituperation nor any other kind of angry clamor is going to help matters. However, inept, inconsistent, or otherwise unreasonable it may seem to me to single out this particular case for purposes of demonstration, at the risk of letting loose again upon his hapless victims the most notorious Indian bandit in his section of the country, it will be some consolation to know whether there was

> "law or no law" behind the Government's honest efforts to prevent a large trouble by nipping a smaller one in the bud."[1]

The then-Indian Commissioner justifies the imprisonment by his personnel without formal charges or court hearing of By-a-lil-le and other ringleaders of his Navajo "outlaw band" in answer to criticism made at the Mohawk Conference of the Friends of the Indian in 1909.

Leupp's justification for the use of informal law and his defense of his own love of liberty for all animals--dogs, birds, squirrels, and Indians--except for the "vicious cur" tells us a lot of the viewpoint of government officials charged with bringing law to the Indian through the American legal system.

His argument that a failure to act would have led the "superstitious Indians" to believe that the "Government had been paralyzed by its medicine" also reflects a particular picture of the Indians and their relationship with American law--that the Indians only know and accept law as it is brought to bear upon them through brute force.

One might ask to what extent this identification of white man's law with unchecked force has shaped the viewpoint of the Navajo today as he confronts tribal, state, and Federal written law and their institutions.

Can a man like Mr. Leupp be a fair judge, if he believes that the end justifies the means? Mr. Leupp was not an evil man. He did some things to help the Navajo people in the Checkerboard area to receive allotted land before New Mexico became a state. But he did not think about law as a balance for Navajos. Instead, he thought of law as a way of keeping order only.

"Habeas Corpus"is a term from the Latin language. It means that a man in jail is brought to the court so that the judge can see if he is legally held, that is, that the jailer has the right permission to keep him in jail.

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[1] LAW OR NO LAW IN INDIAN ADMINISTRATION, by Francis E. Leupp, The Outlook, January 30, 1909.

Mr. Leupp decided it was more important to show the government was strong than it was to show that the government protected individual rights by following its own rules. In short, the Indian Commissioner did not show by his own example how people with power also must obey the law.

In Navajo society, the people had long recognized that powerful and rich people could do harm to their fellows if they lived outside of Navajo law.

There was no protection from these people, from police, and judges because these were not Navajo jobs. But Navajos singled out the witch as the person so possessed with evil and power that he had to be destroyed.

The witch operated outside of Navajo law by his own choice. Some could be warned; others were killed. People did not want to appear to be like witches or to be called witches. They were careful to respect the property and rights of other people.

It is also true that in Navajo society people learned to respect each others' rights. Navajo boys and girls were treated like adults. One reason that they respected you and your property was that they respected your rights.

Navajo people understood that people depended on the acts of each other. When people acted in a way that showed disrespect they were expected to set things straight with the person offended and his family.

Navajo people believed in the balance between order and individual rights. They were afraid of those who threatened this order. It is no wonder that they also learned to fear and distrust the white man's law.

When a man with the authority of law in his hands believes that the people he is applying that law to are not much different from "barbarians" (wild men), or household animals, it becomes very hard for even a fair man to use the law in a fair way.

The statue of justice that people see sometimes in the courthouse or a lawyer's desk is a woman who is blindfolded, with a balancing scale on her hands. This is not, of course, the way things happen. The judge and the policeman are human beings. They have personal prejudices just like anyone. But the responsibility of acting for the law requires that they do all that they can to blindfold their prejudices so that these do not influence their decisions as they weigh the facts of each dispute.

The Anglos who were the early judges of Navajo disputes were not blindfolded. They had very definite and bad feelings about Navajo people. They were against Navajo culture and the Navajo religion, and used the law against things like these.

The Indian Agent had the power to judge under criminal law. It was his responsibility to see that persons arrested by his police force were given a fair hearing to see if they really had broken the law or were really innocent.

One reason that Navajo people did not learn much about real justice from these agents can be understood from the autobiography of one Indian Agent who served in Shiprock near the turn of the century, in the early 1900's.

Read what the Indian Agent at Shiprock had to say, and then ask yourself, "Could this kind of person be a fair judge?"

> "Almost at once I learned that the Navajos were thieves. It was late afternoon when we arrived at Shiprock. The automobile, a touring car which could not be locked, was parked by the roadside just outside the fence inclosing the lot upon which the superintendent's residence was located. The following morning, my tools, jack, chains, in fact, everything the car contained was gone. These articles possessed no value to a Navajo. They were all auto accessories and, at that time, there was not a Navajo-owned automobile on the jurisdiction. Surely, I thought, some passing tourist had robbed the car. When the loss was mentioned to my associates, it was learned that the Navajos were not like other tribes.

"I recall an occasion in court. A young Navajo had just been convicted of stealing. Before sentence had been pronounced, the father asked and received permission to speak to his son. Standing in front of the prisoner sadly shaking a finger in his face, he said, 'My son, how often have I told you not to get caught stealing!' To steal was a virtue, to get caught was an indication of weakness.*

"On my many trips throughout the reservation, I frequently observed articles that I knew had been stolen--articles that could not possibly be of value to a Navajo. I recall seeing a jack, the type that a train crew uses to replace a truck that has left the track, an implement weighing from fifty to seventy-five pounds. When the state was building a highway from Gallup to Shiprock, immense galvanized pipes, some of them thirty-six inches in diameter and twenty feet long, were used for culverts. Some of these pipes were taken by the Indians from the roadside, where they had been left preparatory to installation, and carried twenty-five miles back into the interior. I do not know what prompted a Navajo to steal, but it was not necessarily the value nor yet the utility of the article stolen.

"Now that it has been explained that the Navajos were thieves, I wish to emphasize the fact that this was one of the few undesirable traits they possessed. Given a responsibility, whether that responsibility was the custody of an automobile that must be temporarily abandoned out on the reservation, a sum of money, or a store together with its contents, they were true to the trust. A trader,

> living a hundred miles out from the agency, having occasion to leave home to visit Gallup or Farmington, possibly to be gone two days or even longer, had no hesitancy about placing a Navajo in charge of the premises, knowing nothing would be disturbed during his absence. Many other desirable attributes were possessed by this tribe."[1]

*From this comment, we can see that the Indian Agent did not understand very much about Navajo ideas of right and wrong. The Navajo father was upset about what had happened. But he recognized that it was the public disgrace before other Navajo people that was the real punishment. The boy had acted as if he did not know how to behave. The only persons who do not know right and wrong, say Navajos, are confused and actually sick.

It is hard to get excited about a law that you do not understand, and especially one that is not fair. The white man's law was like that in the early days. No one understood it. No one could understand how to let it work to help you, except by bringing trouble down on somebody else's head. Bad Navajos did this. Other people just stayed out of the way of white man's law.

Comment: The Indian Agent called Navajo people thieves. He did not understand Navajo people, and so did as many people do to hide their ignorance of other races or groups of people--he called them names.

Think about how it must have been to be taken before a man like this who sees you are a Navajo and immediately thinks that you steal things. This was the experience of many people from around Shiprock.

Why does the Indian agent say that Navajo people will guard a person's property, if he thinks that they are thieves? His confusion results from his ignorance of Navajo law ways, the rules that Navajos lived by when property of other people was concerned.

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[1] Kneale, Albert H., Indian Agent. Caldwell, Idaho: The Caxton Printers, 1950

Navajo people in those days did not understand how the "state" could own something. They did not know much about the state or even something called the tribe. These things were large and abstract (something you can't touch, like an idea), not like flesh and blood people.

There has also been a feeling that an owner of property will take care of it or make sure that someone else takes care of it. A property owner takes care of his property, or he really does not act like he owns it at all.

What would an intelligent Navajo think of someone who owned pipes or a car and then left it in the middle of nowhere? It would be hard to imagine an owner who would do this. Maybe, by having his property taken, the owner could be taught to be an owner--taught, in other words, that being a property-owner means taking care of property.

The Navajos tried to teach their own ideas about behavior to Anglos by acting them out. They could not show them laws that were written down.

Unfortunately, the Anglo could not bring himself to see any rules of behavior but his own. He thought that he had the only laws that mattered, and taught this to Navajo people.

That is why today many Navajo people think that the only law, bee haz'áanii, is the white man's law that has been copied into the Tribal Code. They are wrong, but only because they have learned their lessons well.

The Navajos' own laws did teach them to respect the property that belonged to one person or the other. These were private man-to-man laws about respecting and caring for people that you knew about personally.

The Indian agent did not understand very much about Navajo character, because he did not understand Navajo rules of behavior. For this reason, the law that he applied was all the more strange to the Navajo, and all the more unfair.

"Court, consisting of two Indian judges, the entire police force, with myself presiding, convened at the end of each month. A goodly attendance of the tribesmen was usually assured. There was no prearranged docket. One case having been concluded, another would be taken up and the process repeated until all complaints had been heard.

"Court had been in session two full days. It appeared that all complaints had been registered and heard. However, inquiry, as to whether there were further matters requiring consideration, brought up to his feet a man who laid a charge against a well-known medicine man. The complainant alleged that the medicine man had conceived a strong hatred for himself or for his family; that, as a consequence, the complainant's wife had died, two of his children were ill, and his sheep were infested with scabies. It was suggested that the matter receive the consideration of the court.

"Being but recently come to Shiprock and ignorant as to the workings of the Navajo mind, I thought it an opportunity to do a little missionary work. I spoke earnestly and at some length upon the absurdity of the charge. In closing, I related something of the history of witchcraft in America; told how even white people at one time had held beliefs similar to those now held by this complainant. Foolishly, I related some of the extremes to which these whites had gone in ridding themselves of these witches, and finally explained how at last the whites had become enlightened and urged the Navajos to follow their example. I was proud of my talk and flattered by the respect and attention given it. Truly, I thought, I was making a great impression. And, indeed, I was but not of the nature I was seeking. Following my remarks court at once adjourned.

> "A year or more later, I recalled the incident to Deshna, who had interpreted on the occasion, congratulating myself somewhat upon the manner in which the matter had been handled. To my chagrin, Deshna informed me that my talk had procuded an impression quite contrary to that which had been intended. The idea I had intended to stress was that the whites had ultimately become enlightened. However, the idea carried to their minds was something quite different. The medicine man left the courtroom with the others but failed to reach home. His family never saw him again. They had taken the advice of the agent and had patterned after the white man's example."[1]

Comment: The people who came to the agent may have thought that his court could take the place of the traditional means of dealing with witches--killing them. Instead, they were told by the agent not to believe in what they knew to be true. They did not follow his advice, as he smugly assumed. They simply handled the affair in the traditional way and left the white man's law alone.

Today, if a smiliar complaint is made in tribal court, there are things that a court can do. If proven to be guilty, the medicine man can be ordered to pay the victims money, or ordered to stop his evil acts. The people who decide are Navajo judges and members of the community. If they believe the complainant's story after hearing the evidence, they can apply the law to help him.

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[1] from Kneale, Indian Agent; pp. 343-44.

The Naat'aanii

Headmen or naat'aanii were judges of disputes in local communities during the time before Fort Sumner. Communities then, like communities today, were groups of people, made up of more than one extended family, who lived and worked together in a particular place. (A Navajo extended family would include a woman and her husband, together with their daughters and their husbands, and the children of their daughters, all living near one another.)

After listening to speeches of various contestants, a headman would be selected. A man who could well handle both the religious and the day-to-day affairs of the community would be selected. Speaking well, and the experience that comes with age were important. The headmen selected would be the nearly unanimous choice of the people in the community. One of the headman's roles was to set standards that would encourage harmonious relationships.

One writer describes the role of the naat'aanii. As you read what he has to say, think about the way that tribal judges handle many personal problems with Navajo people, and you will see how they have borrowed many of their persuasive devices directly from the naat'aanii.

> The naat'aanii had to perform his duties by persuasion rather than by force. The success of his administration depended entirely upon his personal magnetism and persuasive ability. His talks were often quite general rather than pointed toward a specific problem, and incorporated such themes as harmony and moderation in all spheres of life, peace, cooperation, and hard work. A naat'aanii who skillfully wove into his talks stories from the Navajo legends and mythology was accorded high respect both from his own community and from his peers, especially when these talks pointed toward a solution of a current problem.
>
> A naat'aanii usually pointed several assistants to aid him in overseeing the affairs of the local group. The assistants

received no compensation for their work, and neither did the naat'aanii; their reward was the respect accorded them by the members of their local group. The naat'aanii was expected to settle domestic quarrels and family disputes and difficulties. In cases involving marital disputes, he called a public meeting in which anyone was allowed to speak. The two major persons in the marital dispute were asked to state their views, and then anyone in the meeting was allowed to contribute information concerning the case. Occasionally, one or both of the involved persons had an older more polished "talker" speak for them and, if the case proved to be difficult, a naat'aanii asked a member of the community to sum up the evidence given by each side. Regardless of how the case was presented and handled, it was the naat'aanii's job to settle the dispute. This was accomplished most often by lecturing both parties and asking them to live in peace and harmony and to follow the examples of their grandfathers mentioned in the myths and legends of early Navajo life.

A local headman also judged cases of witchcraft and had the right and duty to pronounce sentences of death. Such death sentences had to have the complete approval of the local group and were invoked only in the most serious offenses, and only after long debate and discussion. He was expected to be a generous person, and to dispense hospitality to visitors. A naat'aanii also represented his local group at large meetings and was the diplomatic representative between his group and other similar groups, tribes, and governments (Hill, 1938, p. 28).[1]

The local political leaders, the naat'aanii, operated within a social control system that respected the individual, and uniform collective behavior was achieved not by authoritarian directive imposed from above, but rather by creating a favorable public opinion within the local group. Speeches, debate, and discussion sometimes all but endless, were consequently the normal means used to create unanimity. The naat'aanii's status was one of leader and overseer of all of the affairs of his local group or outfit, and he was accorded high rank and prestige. His role was that of a wise leader, and he was expected to combine mythological knowledge with wisdom in making decisions for his group. The reputation of a local headman depended upon his good judgment and his rhetorical ability to persuade members of his group to lead peaceful, useful, and harmonious lives.[2]

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[1] Williams, Aubrey W., Jr. Navajo Political Process. Washington, D.C.: Smithsonian Institution Press, 1970. p.6

[2] Williams, p.7.

Commentary: The use of public opinion and the agreement of the entire community are important differences between the Navajo headmen and the judges of today. Navajo judges are now appointed for life. They are independent from public opinion because they cannot be removed if people do not like the way they decide cases or interpret the law.

Independence from politics is a point that is both good and bad. If a judge thinks that the people he convicts will turn around and put him out of office, he may be afraid to apply the law, especially laws that are unpopular.

For instance, the law that says that possession of peyote is unlawful is very unpopular among members of the Native American Church; or the law that says men must support their children by women who are not married to them, or who have divorced them--a law contrary to Navajo tradition, but supported by the welfare department when it urges clients to go to court.

To keep judges from being influenced, the Tribal Council decided in 1959 to "improve the courts" by ending the popular election of judges.

One thing was true then that is not true now. Then people thought that the states might take over the administration of law on the reservation, and the states did have the power then to do this without the permission of the Navajo Tribe, if they wanted to. For this reason, Paul Jones, then Chairman of the Tribe, gave this opinion to Senator Sam Ervin about the law on the Navajo Reservation:

Senator IRVIN. Now, it is undoubtedly true, in your opinion, that in many areas which involve the application of law in individual cases that it is much better to have a determination of those cases made on the basis of the customs which the tribe is familiar with and has used in settling controversies for a long time?

Mr. JONES. Yes, sir. From a very casual standpoint, we have been looking up the different States regulations, whether it be traffic or other regulations, as it affects the States, and we are looking ahead to the time when we would have been absorbed absolutely by the State. We do not think that is anywhere near in the near future, but we know it is coming. It is inevitable but it is way out in the distance. We might as well get acquainted with it right from the beginning and absorb as much as we can understand of it.

Senator ERVIN. I want to compliment you on the excellence of your statement. I am very much impressed with your observations.[1]

Comment: The naat'aanii did not have to worry about foreign law. The law he applied was Navajo ideas about behavior that everyone learned from childhood.

Even if there was disagreement about the specific dispute, people saw that it was better to compromise in order to be held in good standing with community members in other situations. The key point was that many community relationships could be disrupted if people with conflicts did not take to heart community opinion as it was articulated by the naat'aanii.

The law that the naat'aanii enforced was not written by outsiders. It came out of the wise experience of people who had undergone many personal hardships, and who had learned how to work together to survive them.

Topics for Class Discussion

Should law be close to the people's ideas of behavior, or not? Does it depend on the kinds of problems?

--problems between parent and child, or husband and wife

--problems between neighbors (having to do with livestock, or damage to fences, etc.)

--problems between Navajos and car dealers

--problems between the Tribe and the Federal Government.

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[1] U.S. Congress, Subcommittee on Constitutional Rights of the Committee on the Judiciary. Constitutional Rights of the American Indian; Hearings pursuant to S. Res. 58. Part 4, 88th Cong., 1st Sess., March 7, 1963, p. 856. Statement of Paul Jones, Chairman, Navajo Tribal Council.

Traditional Law and Conflicts with the American Government

Aubrey Williams, in his book, "Navajo Political Process," tells about one way that Navajo leaders acted with Government men to, as he puts it, "prevent further violence" and back up the Indian agent.

In his role as a peacemaker between Navajos and Whites, Chee Dodge spoke on November 15, 1905, to almost two thousand Navajos gathered at a Yeibichai being held near St. Michaels, Arizona. Several days before the Yeibichai, Indian Agent Reuben Perry had attempted to seize a Navajo accused of rape at Chinle. The accused, Linni, had been brought to trial in his local group, with a Navajo policeman acting as a referee between the accused and the girl's family. He was judged guilty and the restitution fee was fixed at one white horse. Linni agreed to the fee and had taken the horse over to the girl's family.

When the news reached Agent Perry at Fort Defiance, he refused to recognize the intracommunity way of handling justice and insisted that Linni come to Fort Defiance to stand trial before himself. The accused rapist refused to come in. Agent Perry went to Chinle to get the man, was seized himself and forced to pardon the accused Navajo (Commissioner Indian Affairs, 1906, p.115). Agent Perry put in a call for help from Fort Wingate upon his return to Fort Defiance, for he feared a general uprising was possible, especially in view of the forthcoming Yeibichai Dance for which thousands of Navajos were expected to attend.[1]

Comment: Agent Perry wanted to use white man's law. He angered the Navajo people, because they had already taken care of the injury in the traditional Navajo way. Agent Perry ignored traditional Navajo law. Here was a case where traditional Navajo law put the people in direct conflict with the American government.

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[1] Williams, Aubrey W., Jr. *Navajo Political Process.* Washington, D.C.: Smithsonian Institution Press, 1970, p. 14

At the dance, Chee Dodge and a number of headmen spoke to the assembled crowd of about 2,000. Chee Dodge told publicly for the first time how Manuelito had extracted a promise from him just before the venerated War Chief had died; Chee had promised Manuelito to lead the Navajo along the path of peace, so that they would not destroy themselves by trying to fight the government. The McKinley County Republican published a portion of Chee's talk on December 16, 1905:

> "The President has given you a long rope so you may graze wherever you please. If a man has a good horse and pickets him out he gives him a long rope in good grass and lets him graze as far as he can; but if he has a mean horse he gives him a short rope with his head tied close to a post so he can get but little feed. The President has given you a long rope. Some of you have a very long rope; you live very far from the Reservation; others who live nearer the Reservation have a shorter rope; but the President has a rope on every one of you, and if you do not appreciate the good treatment you are given, if you try to make trouble, he will pull on all the ropes and draw you fellows all together to a tight place... You will lose your stock, and you will be afoot, you will be nothing, you will be wiped out, and you will be guarded by troops, and everybody will laugh at you and say "See what a large tribe this was, and this is all that is left of them."

There was no general uprising among the Navajo after the Yeibichai, and the men who had seized Agent Perry eventually were brought into Fort Defiance by the headmen of the Chinle District, whereupon Agent Perry tried and sentenced them to one or two years of hard labor at the

Federal Penitentiary at Alcatraz (Commissioner Indian Affairs, 1906, p. 118).[1]

Comment: Chee Dodge's description of the white man's law and power as a rope is still a good one. Some law words used today, like "restraining order," still carry his idea.

Though the men who seized Agent Perry suffered for it, the real losers were all of the Navajo people, who saw the white man's law, even as it regulated the affairs between Navajo people, as part of the same long rope.

Before this time, many people had probably thought of the white man's law as dealing only with relationships between white men and Navajo people, or between the Mexicans and the Navajos. The problem of forcing the Indian children to go to Indian Agency schools was like this.

But, more and more problems that dealt with matters between Navajo people came under the authority of the white man's law. Chee Dodge is clear in telling why; it was because of the white man's power over Navajo people, his military power. To disobey, to make and follow laws different from the laws of "the President," was to have the rope pulled tighter.

When the Court of Indian Offenses was established in 1903, three Indian judges were appointed, but the Superintendent was in charge, and he had a hand in the court's decisions.

As Judge Becenti tells, in his history of those times, the punishments were the white man's punishments (the rope was still placed upon the Navajo people), but the reasoning was often done in the traditional Navajo way.

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[1] Williams, Aubrey W., Jr. Navajo Political Process. Washington, D.C.: Smithsonian Institution Press, 1970, p. 14.

Advice on how to live and get along with the Navajo community was included in the lectures given by headmen. The white man punished, with jailings and fines.

How did Navajo law and the white man's law get along together? How did Navajo law and its "judges," the headmen, get along with the kind of white man's law that came to Navajo people as prisoners of war? Not very badly, in many cases. The questions of "fair trial" and "proof adequately presented" were not important in the early days. Navajos had never been shown the process of Anglo-American justice at work. They were treated to military law, where innocence and guilt were predetermined. In the traditional setting, people who were lectured were guilty, in a general sense, of misbehavior that did not conform to the Navajo standards of conduct. They had committed some kind of bad act that showed that they needed help in changing their behavior if they were to get along well in future dealings with other Navajo people.

It is not surprising that "disorderly conduct," the vague Anglo crime, was one of those most often brought to the early and to the later courts. It seemed to embody the traditional Navajo notion of bad behavior, though Anglo-style punishments were used to correct it.

The Indian agent usually paid no attention to problems between Navajos and other Navajos. More important, the Indian agent and the Navajos that he directed in white man's law could not always solve these problems, even if they wanted to. They might have carried off a guilty person and jailed or fined him, but they did not set him right with the community and with his family members. Anglo punishments did not help reconcile a misbehaving person with his own people.

For reasons of economy and, perhaps, for reasons of intelligence, the practice of having local leaders resolve problems was contained even after courts were organized.

The son of Former Many Beads tells how a leader was selected in the Ramah area:

"... All right, that is fine. You can hold the meeting right here at my place," said the trader. So we set a date, and I spread the news.

People came to the meeting, but they did not all come. The more intelligent and mature elder men were absent. I was the only one of this category who attended. Those who were immature and not too bright came, as well as some of the women. Noon came, and people were still straggling in, although there were not many.

The trader, who was strolling about, spoke, saying, "Isn't anyone else going to come?"

"I passed the word around, but for some reason or another no one has shown up," I replied. "I don't know why they are not here," I said.

"Well, then, let's get started," said the trader. "Let's hurry up and settle the matter. What is your opinion? Who would you suggest?" he continued.

In reply I nominated one of the older mature men, even though he had not come to the meeting. "That is the one I suggest," I said.

But the trader said no, so I named another candidate. "I suggest that one," I said.

He vetoed that one too. "He's not capable," said the trader. So I named another one, and he again said no. In that fashion I nominated six men who had not come to the meeting, but they were all rejected. The trader said that none of them were capable.

"How about you? Don't you want it?" he asked me.

"Why me?" I replied. "When have you seen a leader of my stature and appearance? A leader should be tall and handsome. I am certainly not tall and handsome. I am a runt, and that is why I say this," I told him.

"No, from my point of view, you're the logical choice," he said to me.

"I don't think I could make the grade, so I don't know. What do my neighbors think of it?" I answered.

Then he turned and spoke to those few people who had come, and who were sitting there. "I would like to see this man standing here made leader. What is your opinion? How does it strike you?" he said to them.

Without further ado they roared out their answer. "He's good! He's the one we want!" they shouted.

"Are you certain of that?" the trader asked.

"Yes, we are certain," they answered him.

"All right, so be it then," said I.[1]

Comment: The Ramah trader played an important part in the selection of this leader. The idea that an older, mature man should lead was fading, not because an older person was no longer a good person to decide things, but because ties with people like traders and government officials and their power became important. The old ideas about behavior did not die. Instead, ties to white authority became important, along with community respect, in the selection of people to resolve community disputes.

The policeman, the councilman, the grazing committee members, the chapter officers (and later the Community Action Committee members) had either immediate access to the power of white laws or had "pipelines" to it. People knew that they could take a matter to higher authorities to apply Anglo punishments or orders if the problem was not solved in the community by reconciling the differences in the traditional way.

Still later, individual family members could use the court in the same way. They would enter a complaint (file a paper). They would attempt to resolve personal problems at home. If they were not settled at home, they would continue and take the matter to court to be discussed. If the judge was close to Navajo tradition, as well as to Anglo law, he would use the traditional approach of the headmen; he would lecture the people and use the old stories to show people how to act in their future dealings with Navajo people.

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[1] The Son of Former Many Beads (Hastiin Biyo' Łáni Yee Biye'). The Ramah Navahos. ed. by Robert W. Young and William Morgan. Phoenix: Department of the Interior, date unknown. pp. 9 and 10.)

Only if these ways failed, or if he realized that the defendant (the person against whom the legal action had been brought) would not respect the traditional ideas, did he punish him in the Anglo way. Councilmen, police, and others would use the power of their positions in this same way.

Yet, even judges who were skilled and knowledgeable in how the people wanted their problems solved faced pressures from their superiors. The hand of the Agency Superintendent or the Indian agent was heavy in the workings of the police, the Tribal Council, the courts, and the chapter houses; and these government people were usually blind to Navajo concepts of law.

The special pressures upon the judges until relatively recent days will be described below. Use of Anglo power was not without a price tag. The "rope" that Chee Dodge saw attached to Navajo freedom was on the judge and policeman, as well as the individual citizen.

Summary: Each of the modern institutions that came to resolve disputes between Navajos was set within a special framework of authority that was imposed by Anglo military power after Fort Sumner. The rope was always there, whether or not troops were stationed in Fort Defiance. This created a tremendous pressure to adopt Anglo substantive law, Anglo legal definitions for order and behavior.

Yet, because Navajo ideas of right and wrong were always closely related to the way Navajo people lived and worked together, the Anglo law did not always fit. Also, wise leaders recognized that Anglo law, which came from a different history and from different standards and goals, simply did not solve Navajo problems in the way that the people desired them to be solved. The pressure to continue Navajo law came out of the life style of the people. The pressure to change came from the force of Anglo wealth and might.

BAD CONDUCT AND NAVAJO LAW

The things considered bad for Navajo people--stealing, messing with someone else's wife, ridiculing other people and wishing them (or their livestock) dead--were considered grave because of their consequences to the ongoing, day-to-day relationships between family members and larger groups in the community.

The punishment involved more than making the wrongdoer suffer. The wrongdoer would also have to be put right or reconciled more generally with the community. As one informant in an Athabascan village has told us that if a person did wrong, it was remembered for years after, and people would think of him in a certain way.

The Anglo criminal system theoretically is concerned with making the punishment fit the crime, and not making the wrongdoer bear "the mark of Cain" for his whole life. The days of branding a thieffor cutting off one of his hands as a symbol and lesson for him and the whole community have passed in the western world. So, too, cutting off the tip of the nose of a sinning woman is no longer a Navajo custom.

As the Navajo society becomes more mobile, the punishment by bad reputation, and the results of bad acts to relations with other Navajo people are less clear.

The punishment of Navajo men by jailing or fining them in places like Gallup or Flagstaff has materially bad results on the whole family, which is left without food or money, and is dependent on someone else for water or wood.

In Anglo eyes, the "badness" of an act is not judged by how much it disrupts family and community relationships. A traffic ticket is only disruptive in this sense to an abstract degree. Getting drunk in Gallup is certainly not as bad as getting drunk at the sheep camp and chasing women and children there, if you think of bad acts as those that have consequences on relationships between Navajo relatives and friends, generally, *unless* one takes into account the involvement with the police and the courts, and the fines and jailings that may result from drinking in Gallup.

Bad acts, as viewed in this thoroughly pragmatic way, in terms of consequences, become not simply misconduct, but conduct that gets one involved with the legal process.

This definition of bad acts is more general than that of the Anglo, since the law, in Navajo experience, only punishes. Nothing good can come of being involved with the law. The best thing that can happen is to get out of the process as quickly as possible, and so an arrested person cooperates, and hopes to be free as soon as possible. In short, he pleads guilty, and does not prolong his involvement by questioning the authority of the courts, or what the policeman says, even if what he says is not really correct.

The courts, and the things that happen there, are viewed as mysterious and out of control, or beyond the ken, of Navajo skills. Giving in becomes the only approach.

Certain results follow from these attitudes. Bad acts are not bad anymore if you don't get caught. The impact upon relations with other Navajos is not seen as the main consequence of a bad act anymore. And, where the legal system is not very strong, as in rural areas, this opens the door to all kinds of bad acts--acts that are not considered bad anymore, because nothing happens. People don't think any worse of you, and you don't get caught.

Punishment in the old way is not very easy to reinstitute unless people are still bound together by duties and rights. If young people are mobile or independent, then there are not bases on which to institute the old criteria for "bad acts."

The court system does not add to the distinction between good and bad acts, because everyone knows that either bad or good acts will have similar consequences, imposing similar hardships, if the police are involved. Even the use of lay advocates does not make the court system perfect. Instead, it adds to this irrationality in some respects, when guilty persons go free due to the conduct of the police. (It might be that this freeing on technicalities could be explained as punishment for the bad acts of the policemen--acts that reflect upon his interaction with Navajo people--but few Navajo adults have received this explanation.)

POSITION OF THE INTERIOR DEPARTMENT WITH RESPECT TO TRIBAL LEGAL SYSTEMS

> "We now encourage each tribe to adopt a code that conforms as much as possible to the law of the State involved. Our goal is to make the Indians a part of the States in which they reside. A model code could be drafted in a manner that is consistent with that effort...
>
> Title III of the Indian Civil Rights Bill, which relates to State assumption of civil or criminal jurisdiction over Indian reservations, changes the present law now embodied in section 7 of Public Law 280, 83d Congress:
>
> a. by requiring consent of the tribe occupying the reservation before a State may assume jurisdiction...
>
> The first of these changes is highly desirable. Our files are replete with resolutions and communications from many Indian groups urging this change. The change would do much to allay the fears, whether real or imagined, of the Indian people that they may be subjected to strange courts before they are ready, or before they are assured of fair and impartial treatment."[1]

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[1] U.S. House of Representatives, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs. Hearing, Rights of Members of Indian Tribes. 90th Cong., 2d Sess., March 29, 1968. Letter to Hon. Wayne N. Aspinall, Chairman, Committee on Interior and Insular Affairs, House of Representatives, March 27, 1968, from Harry R. Anderson, Assistant Secretary of the Interior. p. 25.

Comment: The position of the Interior Department was and is contradictory--that Indians should have their own system of laws and courts if they want, but that these laws should be like the white man's in form and substance.

While the Bureau of Indian Affairs gave a philosophic direction to justice problems on Indian lands, their concern for implementation of an adequate court system was less apparent. Less than one percent of the appropriations of the Bureau of Indian Affairs during the decade 1958-68 was dedicated to "law and order" (testimony of Marvin J. Sonosky, attorney, page 107 of hearings cited above).

City officials spoke against giving the tribes the right to consent to civil and criminal jurisdiction by the states. The mayor of Scottsdale, Arizona.

> "Our opposition to the repeal of Public Law 280 is based on the belief that it would in fact enslave them in a cocoon of privilege--that of helping to make laws for others from the jurisdiction of which they could choose to be excluded. How can we have people who vote for representatives to make laws, who vote for judges, then determine whether or not those laws will apply to them, or have those judges hear their cases. Such a proposal is so downright destructive of American principles as to be indecent."[1]

The director of the New Mexico Municipal League said in part:

> "In the absence of State law applicable to Indian lands, will the tribal government enact laws covering the many circumstances and situations in which an individual finds himself today? I wonder if a banker will lend money to an Indian residing on tribal

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[1] House Hearings, pp. 78-79.

> land if he knows that the State's Uniform Commercial Code is not enforceable on Indian land?"

It is not too ironic that these same organizations fought the application of state restrictions on speculative land development taking place on Indian land in the 1972 state legislature. Self-interest, not the interest of Indian people, was dominant.

An elaborate argument in favor of uniform jurisdiction was contained in the position paper submitted by the New Mexico Municipal League (p. 85, pp. 86-87, hearings cited above).

> "...[It] divorces the Indian tribe from the family of governments and, in fact, segregates the Indian on tribal land in the fear that once leaving such land he will be subject to state law with which he is unfamiliar and which is unknown to him. In essence, the language found under these Titles says to the Indian 'you must live under one set of rules while residing on tribal land, but another set of rules whenever you leave the tribal lands.' If the Indian is to enjoy all the fruits and benefits of American society without confusion and without conforming to a double standard, then he must prepare himself from his very beginning...
>
> "It should be borne in mind that Public Law 280, as presently drawn, carefully protects the proprietary interests of the Indians in their lands and other species of property. So it can scarcely be argued that the proposed bill is necessary to prevent a state from despoiling the Indians of their property. The real purpose of the present Public Law 280 is to encourage that progressive trend toward uniform state jurisdiction over Indian and non-Indian citizens.

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> It would be most undesirable to have an expression of Congressional intent at this date to retreat from the promising steps...[taken] toward uniform state jurisdiction and take a long step backwards and thereby encourage the Indians in the belief that they can forever remain independent of state jurisdiction as so many enclaves of land and people enjoying numerous benefits from the state but resisting the uniform and non-discriminatory application of the police power of the state."

Comment: A strong statement against PL 280 and its power to impose state law on Indian people came from an attorney for various tribes in the Dakotas and Wyoming (statement of Marvin J. Sonosky, hearing cited above, p.104):

> "Public Law 280 permits the State to impose its laws on Indian people living on Indian reservations without their consent, and of all the Indian legislation on the books, there is none better known to Indians or more generally despised than Public Law 280.
>
> "Public Law 280 and the provisions that I am talking about that permitted legislation by the State without the consent of the Indians to subject to jurisdiction was adopted by Congress without any hearings. No Indian tribes were heard with respect to that provision of the statute which relates to extending State jurisdiction without tribal consent. That was done in executive session.
>
> "When this bill came before the President, President Eisenhower, he was tempted to veto it and he characterized it as an unchristian-like approach at the time he signed it into law, and he urged Congress then in 1953 to change it."

Mr. Sonosky continued in later testimony (pp. 109-111):

> "Public Law 280 permits State sovereignty to be imposed on Indian people residing in Indian country without their consent. Of all Indian legislation on the books, there is none better known to Indians, or more generally despised, than Public Law 280. The most objectionable provisions of Public Law 280 are those contained in sections 6 and 7. These provisions were inserted in committee without an opportunity for the tribes affected by those sections to be heard. When the legislation was sent to President Eisenhower for signature, the tribes bitterly protested the bill and urged veto. President Eisenhower recognized that the bill was contrary to principles of self-determination and standards of democracy that every American takes for granted. He characterized the bill as an "unchristianlike approach" at the time he signed it into law. President Eisenhower at the same time made clear that he expected the next Congress to rectify the wrong, at least by requiring "consultation." But although bills to amend Public Law 280 to require tribal consent have been introduced in almost every Congress since the 83d, the wrong has not been rectified...
>
> "...Given the facts, Americans will not agree arbitrarily to impose their will on another people. This tenet is a fundamental precept of our foreign policy. We think it should apply at home to our own American Indians."

The position of the National Congress of American Indians was very clear (hearings cited above, page 120).

> "Whereas, there was adopted in the 83d Congress Public Law 280, an Act to Transfer Civil and Criminal Jurisdiction to any State in which an Indian reservation is located, without the prior knowledge and consent of the Indian Tribe or Tribes, and
>
> "Whereas, the National Congress of American Indians is opposed in principle to the adoption of legislation affecting the lives and welfare of the Indian without consultation and consent of the Indians, a principle which the Founders of this Nation so strongly voiced in their relations with the British Parliament, and
>
> "Whereas, the President of the United States, on the occasion of signing Public Law 280, on August 15, 1953, called attention to Sections 6 and 7 of that law, which had been included without prior consultation with the Indians who might be affected, and recommended that 'at the earliest possible time in the next session of Congress, the Act be amended to require such consultation. Now, therefore, be it
>
> "Resolved...that this organization record its opposition to P.L. 280 in its present form..."

Title I--The Bill of Rights and Indians

Many people criticized the first section of the Indian Civil Rights Bill as an attack upon traditional law. Its imposition of the bill of rights found in the United States Constitution and the due process approach was set to contradict the traditional approach.

The author of the bill, Senator Sam Ervin, answered critics this way (hearings cited above, p. 134):

"The charge has been made that Title I would impose unreasonable burdens upon tribal governments and would destroy traditional forms of Indian tribal government. I do not believe that these objections are valid. All Indians are citizens of the United States and in my view, should be entitled to the basic constitutional rights which are secured for other citizens by the Bill of Rights. I cannot understand why anyone would object to giving them such basic rights. For instance, I fail to see why any tribal government would want to try any Indian for the same offense twice, or compel any Indian to be a witness against himself or impose excessive fines, or inflict cruel or unusual punishments, or deny to any Indian the privilege of the writ of habeas corpus or any of the other rights enumerated in Title I of S. 1843. Hundreds of Indians and numerous tribal leaders have told the Subcommittee that they have no fear of the provisions of Title I since their tribal courts already adhere to the basic principles of fairness and justice embodied in those provisions. To insure that these rights will always be secured to individial American Indians against possible infringement by any tribal government, we must have an organic written law which places limits upon the whims of man and provides for the rule of law rather than the rule of man. Obviously, no piece of legislation will please all men at all times. In our form of majority rule in America, democracy assumes that individual objections may not always be accommodated by the legislative process."

THE GROWTH OF GOVERNMENT IN NAVAJO COUNTRY--THE ANGLO INFLUENCE

The Concentration of Power

In 1923, Indian Agent Fall created the Navajo Tribal Council and abolished local councils. His intent was to extend the lease-making power of the Tribe and the representation of all Navajos in the drawing up of oil leases.

The tribal councils in local areas were in very much the same position as the courts are in these days. In 1915, Washington advised the Indian agent in Leupp that "so long as the council can be used and controlled, it should be of great benefit to the Indians" (quoted on page 49 of The Indians and Federal Indian Policy, by Lawrence C. Kelly; 1968; University of Arizona Press.)

The Indian agent called all adult males together to approve oil leases in the local area. If their offers were at first rejected, oil companies offered people jobs.

The Wheeler-Howard Act

This famous law, passed by Congress in 1934, included plans for a system of Indian courts created below federal jurisdiction to be responsible to the tribes.

At that time, while federal courts took jurisdiction over eight major crimes, the other crimes were handled by an administrative tribunal composed of the local superintendent and several Indians appointed by the superintendent.

Congressmen who didn't like the plans took away the part of the bill that had to do with a new court system before the bill became a law. They felt that Indians should be subject to the same laws and courts as other people, whether they understood them or not.

The Navajo people rejected this bill, which included in it plans for revolving credit, plans to write a tribal constitution, and other matters. They were persuaded that the bill was tied to stock reduction on the reservation.

The Law and Order Code

The Navajo Tribal Council adopted as written tribal law the "law and order code" that the Department of Interior lawyers had written in Washington to take care of crimes on all of the Indian reservations.

The executive branch of the Tribe took over the job of maintaining law and order in the late 1950's.

Some of the crimes that became part of Tribal law were changed when the Tribal Council passed upon them. But most were generally the same federal law from the law and order code, written with certain ideas in mind:

1. to make Indian crimes the same as the crimes in the neighboring states. Making laws the same for Indians and non-Indians meant that Anglo ideas about what is right and what is wrong were made part of Navajo law. Nobody stopped to consider that Navajos could have different ideas about the law of their own land than Anglos might have.

2. to combat Indian customs that Anglos did not like. Navajo attitudes about sex were disliked by Anglos. The idea that people could make love who were not married was one of these disliked attitudes. Plural marriage was another "crime." Finally, laws about child support were included, because they were demanded by Anglo welfare departments.

Voting

The federal government in 1924 gave all non-citizen Indians born within the territorial limits of the United States full citizenship (43 Stat. 1255). Prior to that time, conditions such as service in World War I or payment of taxes had been put in the way of Indian people. Arizona restricted "wards of the government" and New Mexico's constitution restricted the voting of "Indians not taxed."

Indian Superintendent Kneale went to the voting booths at Farmington with Deshna Clah Chischillige after the Indian Citizenship Act in 1924 and asked for a ballot for him. The election judge refused, citing an opinion of the state (Kelly, above, p. 189).

A state court test in 1928 in Arizona went against the Indian. When pressed for an opinion, the U. S. Attorney General refused to act, stating that the government had "no legal interest." If Deshna "feels aggrieved by reason of the provision in the state constitution which excludes him from the right to vote because he is a non tax-paying Indian," the thing for him to do was to "apply either to the state of Federal courts, as he may see fit and proper, like other citizens of the United States."

Not surprisingly, cases did not establish the right to vote until 1947. Nearly twenty years of discrimination occurred before the federal government saw fit to defend the legal rights of Navajo people to vote.

"Professor STEWART. What is statutory rape? It is the process of fornication between a male and female where the female is below the age of consent. This happens all the time. High school boys and girls commit statutory rape, college boys and girls commit statutory rape.

I knew a young man when I was in high school who was caught in the act of fornication by the girl's mother and could have been accused of statutory rape and the evidence was without question. The mother and the father of the girl both saw the circumstances of this situation, but the boy was not charged with statutory rape. He was told he should go down and consult with the juvenile judge. The juvenile judge, knowing of the committing of the statutory rape, did not say, "Well, we will put you in jail." He said, "Now come on, get married, do better--study or just be good." This happens all over the Nation, but on Indian reservations the authorities seem to allow this act to become a means of vindictiveness. A young man has been seeing a young lady for a while, and practicing trial marriage, but they are not put in jail. Later, for continuing the same practice the man is sent to prison.

What we have in this case, and I think in many others, is a failure to recognize that many of the acts are not illegal according to the tribal pattern. For them to be used in such a way merely pads the statistics and gives a false impression of the actual situation of the legal status of the Indian. In other words, because these young men are not properly represented, and the families are not properly counseled, the pattern amount the Ute, for example, where it was an acceptable pattern that young men and young women should have sexual intercourse before marriage on a trial marriage basis, young men were sent to prison. Trial marriage is almost universal. In fact, this was a universal pattern among the American Indian.

The Federal law does allow Indians to practice Indian marriage under Indian custom. That is, Indians with two wives are not put in jail for bigamy because they recognize that Indian custom marriage is still a marriage and customary marriage is respected. However, the tribal custom of trial marriage becomes misused as a device for personal vengeance or something else.

My point is really this: By some device Indians are punished in a very large proportion because they continue practicing tribal custom. Of the 60 Indians at the Federal Correctional Center, about a fourth of them are there for statutory rape. There isn't one white man there for statutory rape. There is a breakdown in our legal system of giving legal counsel or providing services of consultation. When a young man from the Southern Ute Reservation was in jail for statutory rape in 1959, it meant that 1 out of 200 adult male members of the tribe were jailed for that offense. Finding the same thing nationwide as represented by the young men charged with statutory rape in the Federal Correctional Center in Englewood suggests that some place along the line there has been a breakdown in our proper legal procedure.

I am not sure whether there are other areas of law of that type that might help explain the rather appalling discovery that the Indians turn out to be proportionately the most criminal element in the Nation. I think there has to be examination in many areas, including possible discrimination in arrests.

The Indians themselves have reported that under certain circumstances they simply assume that they will be convicted and the police will say, "Well, you might as well plead guilty." They plead guilty and then they are sent up. They should not plead guilty in many instances, and the difference merely in the advice or the pressure of pleading guilty and making it easy to get it over with, as compared to not pleading guilty and having a trial and maybe getting off, may be a difference of many percentage points in the statistics that we have."[1]

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[1] U.S. Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary. Hearings, Constitutional Rights of the American Indian. Part 3, 87th Cong., 2d Sess., June 1, 2, and 6, 1962. Statement of Omer C. Stewart, Professor of Anthropology, University of Colorado. pp. 531-532.

AN ATTORNEY FROM SOUTH DAKOTA TOLD A SENATE HEARING WHY HE FELT INDIANS DID NOT EXERCISE THEIR CONSTITUTIONAL RIGHTS

Mr. ROUBIDEAUX. There is one situation that isn't in the nature of discrimination or denial of constitutional rights, as such; I think it's a result that comes about in denial of constitutional rights due to economic conditions. I refer, specifically, to the great disparity in the percentage of Indian people in the State penitentiary... Now, I think the reason for that is this: it's purely economic. The Indian people, in the first place, do not have the money with which to hire counsel, and, in the second place, when they go before these different judges, there is a language barrier. They don't really understand what the judge means when he says, "Do you want counsel?"

Many of the Indian people have been taught, through a hundred years, that cooperation will get you every place, and opposition will just cause you trouble; so, I have had numerous instances of Indians pleading guilty to crimes they did not commit, just because the sheriff told them, "If you plead guilty, it will go easier on you." But, the Indians do not understand that they really are entitled to these constitutional rights, due to the language barrier and their misunderstanding of it. That's the educational facet of it. The other is economic. They don't have money with which to employ counsel.

Mr. CREECH. You have discussed briefly the situation of the Indians being denied counsel, or else not requesting counsel, and is it your position that the Indian is denied due process because of the unavailability of interpreters to explain to him, in his own language, what is being said to him by the judge at the time?

Mr. ROUBIDEAUX. I think so. I definitely think so.

Mr. CREECH. This would be the case not in the tribal courts where presumably the local language would be used, but this would be the case in the Federal district courts, in the courts of Indian offenses?

Mr. ROUBIDEAUX. And in the State courts.

Mr. CREECH. And in the State courts. Is this the area in which you have difficulty?

Mr. ROUBIDEAUX. Don't misunderstand me. I think the judge honestly believes the Indian understands what he is saying because he spells it out for him. He said, "Do you understand?" And he says, "Yes." He doesn't understand any more than the man in the moon, and I think that we should provide some system whereby there is an interpreter to make absolutely certain that the Indian understands his rights when they're explained to him. Like you say to an Indian with little or no education, you say that "You are entitled to be confronted by the witnesses against you. You are entitled to cross-examine them." Why, you might just as well be speaking German to him because he doesn't know what you are talking about."[1]

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[1] U.S. Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary. Hearings, Constitutional Rights of the American Indian. Part 3, 87th Cong., 2d Sess., June 1, 2, and 6, 1962. Statement of Ramon Roubideaux, Attorney at Law. pp. 598, 602.

WHAT LAW TO USE?

We have seen that white men had little or no understanding of Navajo law ways. Where white man's law did not apply, they saw no law at all.

When the modern tribal judges were trained, a new excuse for forgetting about custom was given by the lawyers who advised them. This was, that they should teach the Navajo people about law "on the outside" by using that law. Using Anglo law from the outside to settle problems between Navajo people about their property or about family disagreements would help the Navajo people "join the mainstream." Uniformity of law on the reservation with that on the outside was seen as the goal of the Bureau of Indian Affairs.

Little thought was given to the fact that law has a special function. It helps people avoid problems and solve them, if they can understand it.

By ignoring Navajo ways, the Bureau of Indian Affairs decided to let the Navajo people remain in a state of confusion about law until they learned white man's law sufficiently to act according to it.

The BIA policy about law was all wrapped up with the infamous termination policy of the United States Government. Strangely enough, it was the part that was still pushed long after the BIA had rejected other parts of the termination policy, such as doing away with special land rights for Indians, or placing Indians in unfamiliar urban environments.

The Case for Uniform Laws and the Case for Custom

There is no question that some kinds of laws help the Navajo Tribe when they are the same as laws in the neighboring states. For example, laws about corporations (businesses that are registered with a special legal identity of their own) need to be uniform, to help businesses organize on the Reservation. Also, if the Navajo Tribe wants to tax the incomes of people or the profits of businesses, it is usually better for everyone if the laws are similar to ones in other places. In short, laws of this kind help commercial relations that involve businesses on and off of the Reservation with dealings in both places. Also, the Tribe can establish its own powers, independent of the state, by doing things that the state does, like levying taxes on persons and businesses upon the Reservation.

Yet, there are many areas of human dealings between Navajo people where the Anglo law is not necessary, or even very helpful. Relations between family members, relations between Navajo neighbors, and problems when property is damaged are some of these areas that Navajos have handled in their own way for many years. Anglo law is not very helpful when the solutions to problems are not tied to Navajo ideas about property and family relationships that Anglo people do not have.

Custom, then, remains important when Navajo people see in it the better solution to their problems. The best judges must decide which rule is best, when Navajo people come to them with a problem--the old way, or the white man's rule. Once again, the training of the judges did not prepare them to make this choice. It was up to the judges to use their common sense.

BIA teachers also had another argument against custom. They told the judges that they stood between the courts of Arizona and New Mexico and the Navajo people. What they meant was, that unless the Tribal Court performed to the satisfaction of the governments of Arizona and New Mexico, these states would take over criminal and civil jurisdiction of the Navajo Reservation.

It was true that, before the Indian Civil Rights Bill of 1968, the states of Arizona and New Mexico could have taken over civil and criminal jurisdiction of the Navajo Nation without the permission of the Tribe. But, factually, this was not a very severe threat, since neither state wanted to spend tax money to provide the necessary courts and people to run them. After 1968, the states of Arizona and New Mexico could only take over the court system with the special permission of the Tribal government. No one believes that the Tribe will give the states this permission.

In short, judges in the Tribal Courts were told that outsiders were looking over their shoulders. They were told, in effect, "Apply laws that these people understand, and in a way that they understand, or else."

Even now, after this threat has passed, many judges trained in the old way find it hard to change their ways, and to apply custom where it will help the case, even though the Tribal Code says that custom is superior to unwritten Anglo or common law and should be applied.

The Indian Civil Rights Bill and Custom

The Indian Civil Rights Bill required that the Tribal Courts, along with other units of the Tribal government (such as land boards and welfare departments), provide due process when hearings were held before it.

Due process means different things for courts and for administrative boards, but basically it requires that:

1. A man get a chance to tell his side of the story and to question anyone who speaks against him. He gets a chance to hear all of the proof that is used against him and that the final decision is based on. The whole hearing happens there in public, or is told about by the persons who saw it themselves.

2. The judge or person(s) who make the final decision are not involved in bringing the case against the party before the court or board. They are independent of the police or the prosecutor or welfare caseworkers who investigated the case.

3. The Indian has a right to a lawyer or legal representative to represent him and tell his side of the story and to ask questions of the people who speak for the Tribe, like the policeman, or to question the other side, whoever it is.

The result of the Indian Civil Rights Bill has been to make the judge, prosecutor, defense lawyer, and policeman all more conscientious about doing their own work only. As stated earlier, the judge wears fewer hats in the Tribal Court, and concentrates on listening to the facts and applying the law to them.

NAVAJO TORTS

Most of the bad acts described in an earlier section on Navajo tradition would be compensated for by a money or property payment to the person who was harmed according to traditional thinking unless the person harmed was a close relative. Even small children were responsible for the injuries to people or property that their acts caused.

The Anglo-American definition of a tort is a wrongful act that is private and that does not arise directly out of an already defined legal relationship such as a contract. For example breaking a contract is not a tort.

The law of torts is perhaps the one that has changed most of Anglos as the complexity of their lives has changed. New things are protected by it through new judicial decisions. For example, the right to privacy or the infliction of injuries to a child before it is born are new "rights" that have come into favor in some courts.

When an Assistant United States Solicitor spoke to American Indian judges in 1970 (See, "Torts in Tribal Courts" by Barry K. Berkson, Esq., A presentation for the National American Indian Court Judges Association in Reno, Nevada, January 28, 1970), he concluded that "in the absence of tribal custom," tort cases must be decided in tribal courts on the basis of the common law of torts."

According to the Tribal Code, custom, where it exists, is held to be superior to the common law (judge-made law) of the states.

The position of the discussion that follows is that the work of anthropologists and field work conducted by the authors does demonstrate that traditional ways of dealing with torts did exist and were used in dispute resolution among Navajo people. More importantly, the expectations of Navajo people are today colored by certain ideas that diverge from the common law conception of tort law although they fill the same purpose. As Berkson put it in his address to the Indian judges:

> "...tort cases seem to be concerned
> to a large extent in whether the

> conduct is considered unreasonable or socially harmful to the point of view of the community as a whole."

(Berkson, page 4). Yet, unlike criminal law, the award of the court is to the immediate victim of the wrongful act or to his dependents.

Conduct that is considered unreasonable or socially harmful in Anglo tort law may not be considered worthy of punishment by Navajo standards. For example, trespassing, the intentional entrance upon the land of someone else is considered to be generally wrong by Anglos. Navajos are more concerned by trespass of animals only, since this is more likely to cause material harm to them if the animals eat or destroy forage.

To be one who uses the power of witchcraft is still something that concerns many traditional Navajo people. Yet witchcraft is not widely understood by non-Navajo people.

Differences in the kind of conduct perceived as harmful by Anglo and by Navajo standards are important in distinguishing between the two torts systems. However, the Navajo attitude toward tortious conduct differs most greatly from the Anglo one in that the Navajo focus is nearly exclusively upon the effects of the injury when a demand is made that damages be paid by a wrongdoer, not upon who was at fault or whether the victim, by his own actions, contributed in some degree to his own injury.

Anglo-American tort law has long required that the wrongful act be shown to be intentional in many cases or that an injury be shown to have resulted from acts that a reasonable man would not have done. This second category is called acts of "negligence." Only in the most serious kinds of activity, such as work with explosives, blasting, crop dusting and things that are very dangerous, would the court say that the person is strictly or absolutely liable for any injuries that he causes.

If a person is negligent it must be proven according to Anglo-American common law. First you must show that he should have acted in a reasonable and prudent manner and that he did not do so. Then you must show what the injury is and how it came about because of his failure to act in a reasonable manner.

What this heavy burden of proof upon the person who was injured means is that the courts that operate only in the Anglo-American tradition will not award damages to people for unavoidable accidents.

As Berkson put it:

> "Such rules are adopted [in cases such as a car that goes out of control when hit by another car or when a driver has a heart attack and loses control of the car] simply because the line must be drawn somewhere and if the defendant is to be held liable merely because he has ridden the horse or driven the car, it would be quite as logical, at least in the eye of the [Anglo] law, to hold him liable for owning it or even for drawing his breathe or being born. To hold that he does every voluntary act at his peril and must insure others against unreasonable and intolerable burden upon all human activity. Hence the law recognizes unavoidable accidents as imposing no liability upon the person involved in the act."

Besides the need to establish that the act was foreseeable, that a reasonable person could foresee that it might cause injury and that the injury was the proximate cause of the activity, the Anglo law places yet another limitation on getting damages for personal or property injuries.

If the injured person acted in a way that contributed to the situation, if he was contributorily negligent, the court usually does not compromise in its award of damages by scaling down the money payment. It refuses to give the injured person anything at all.

The Navajo view is considerably different. Acts that result in injuries interrupt the Navajo's life in ways that have minor or major significance. The focus of Navajo law ways is then upon that interruption, especially the loss in its human terms of a loved one or one upon whom plans depended. While it is true that the act may have resulted from the victim not acting correctly, the wrongdoer was not involved in those plans unless he was a family or clan member.

Consideration of the nature of the conduct of the wrongdoer is not a paramount question here if he is a stranger. Instead what is expected in all cases of injuries that arise between traditional Navajos is that the person who did the injury will make a symbolic material payment for the loss that he has caused. The only exceptions that are made are for family members or people from the same clan from whom a symbolic payment would be of no importance. They also, a traditional person would conclude, shared in the loss. Their plans and their way of life was similarly affected by their act.

The principle of Navajo torts is, then, one of strict liability. It does not result in an "intolerable burden upon all human activity" because the damages sought are not a direct monetary repayment for the loss and all of its ramifications, but only token.

As one lay advocate put it in our field investigations, human loss cannot be fully compensated for by money. The formulas used by personal injury lawyers who seek to place dollars and cents value on every minute of suffering of a person disabled by an accident would be incomprehensible to a traditional Navajo person.

Ultimately, the traditional view of Navajo torts may rest on the secondary role that money plays in the plans that these Navajo people make for their lives. If this is the case, one can presume that, as Navajo society becomes completely attuned to the dollars and cents mentality that propels its Anglo counterpart, the Navajo view of tort liability would also necessarily be constricted with doctrines such as those that narrow Anglo-American tort law. Yet, the interviews conducted by the bilingual staff indicate that this transformation in thinking has not taken place for many people.

The result is that cases of injuries for which Anglo law would provide no compensation can find acceptance in Navajo tribal courts if the judge recognizes that the customary view prevails in many quarters and therefore supersedes common law on the subject.

A valid Navajo common law would, then, seek to reflect the values and expectations of a society that is in transition. The continued importance placed upon the private symbolic remuneration of injured parties as a cornerstone of Navajo justice is a factor that cannot be ignored by judges and lay advocates who seriously desire that the legal institutions offer Navajo people a solution to their problems.

Note for Teachers:

Have the class read the interesting field notes of the anthropologist W. W. Hill contained in the appendix of this text. Further comments on Navajo ideas about negligence are contained in the Crownpoint interviews with lay advocates. See also a series of charts prepared by Richard Van Valkenburgh and reprinted with permission from Museum Notes, Museum of Northern Arizona, on procedures in traditional, transitional and modern Navajo society for a series of wrongful acts.

What follows next is a letter which was written by one of the co-authors, a lawyer, while still in the employ of DNA Legal Services Program. The letter shows an attempt by the attorney to get other attorneys and tribal court advocates working with the Navajo people to utilize the traditional ways, customs and methods of approaching many of the problems which are brought to them by their clients.

SUBJECT: An approach to a renewed perception of the place of the DNA advocate within the galaxy of dispute resolving mechanisms.

What follows is a brief outline of questions that may be incorporated into the client interview that will help the advocate or attorney perceive where he sits within the galaxy of dispute resolvers still available to his client who might resolve problems for him. Their origins may be out of Navajo social structure, or Anglo bureaucracies that have been imposed and intergrated to a greater or lesser extent with Navajo society. This is not an attempt to turn back the clock but to better understand what role the counselor or attorney is to perform within this essentially pluralistic environment. Put another way, we want to know who shares our interest in particular problems and, perhaps, if they satisfy the client in ways that we do not.

A. Did you try to resolve your problem before coming to D.N.A.? How? Through whom? (person, agency)

An Outline:

1. Does this person usually help people resolve problems like this one? Does he help with some parts of it? Has he already solved part of the problem? (Ed: For example, the third party may attempt to reconcile husbands and wives. However, he may not deal with division of property, should that become necessary).

2. Did he call the other (your adversary) and listen to his side?

3. What proof did he ask for from you?

4. What did he finally decide or did he help you reach a compromise with the other side or did he give you (or the other person) some advice? What was it?

5. Why was it that you were not satisfied with what happened there? (This is probably apparent by now).

B. Who referred you to D.N.A.?

Procedure:

Ideally, a counselor or attorney will sample the cases that come into his office with these questions. Both the subject of the dispute (land, husband-wife quarrel, debt in money) and the adversaries (Navajo, wife or child, Navajo relative or clan member, Anglo car dealer, Anglo bureaucrat, trader) will vary the possibilities that someone else has already taken a hand in the dispute.

It may also be certain persons are still involved in husband and wife disputes in Chinle or Tuba City and no longer important in Shiprock and Window Rock, reflecting the divergencies in social structure and perception of Navajo people in each area and the impact of bureaucracies in each place.

At the end of a month, counselors and attorneys could compare notes with one another in their own offices. If they have found that third parties in a particular subject area were important, they could delegate one attorney and one counselor to write a short statement about this.

The next step would be to have a meeting with representatives from each office to discuss the findings from the entire reservation in light of some anthropological studies and to plan how DNA could best react to co-exist with these other problem solvers without inadvertantly destroying their base of authority if they are still helping people solve particular problems.

Finally, I would like comments from attorneys and counselors regarding these ideas. They are untried, to my knowledge, on the Reservation and reflect my own experience in field research in other places as well as my own misgiving about how I functioned as an attorney in Crownpoint. The outline does not contain another set of questions regarding substantive definitions that clients use and that we may not be aware of. This is an equally serious problem that I will treat later in another memo.

LAW AND NAVAJO PEOPLE

The Navajo Tribal Code is a set of books containing the written law that has been passed by the Navajo Tribal Council to govern the operation of the Tribal Courts when they hear cases between Navajos or cases brought by non-Navajos against Navajo people. For the Reservation the Code is like what the volumes of all of the laws passed by the state legislatures are for the states of Arizona and New Mexico.

But the Tribal Code is not all of the law on the Reservation. Federal law applies to some actions of non-Navajos. So does state law. Also, federal criminal law applies to the most serious crimes committed by Navajo people on the Reservation.

Each state has not only written law, passed by the legislature, but common law, which is brought into the law of the states as the judges decide specific cases. These opinions of the judges are published. Lawyers remind the judge of them when they argue a case. These opinions also reflect the way that Anglo-American law has been interpreted since the legal system on which it is based began hundreds of years ago in England.

There are many important legal thoughts and ideas, then, that have never been passed by the New Mexico or Arizona legislature.

The Navajo Tribe also has a kind of common law that many judges can apply to specific cases. It is the Navajo customary or historical ways of deciding disputes or who is wrong or right in a case.

Where these ideas do not conflict with federal law and where no written law of the Tribal Code conflicts, custom is always held superior to the law of surrounding states.

NAVAJO LEGAL VOCABULARY:

A Critical Analysis

Language and Experience

The legal vocabulary as it exists in the Navajo language gives the Anglo practitioner or teacher of legal education a partial view of a different perspective from his own, because it is a vocabulary born out of a different historical interaction with the Anglo-American legal system.

Navajo people were confronted with a system that claimed to be the law, to the exclusion of other means of social ordering that Navajos used. No attempt was made by the early courts to integrate Navajo law ways or customs with Anglo forms of law or to adapt law to custom. Instead, law was used to root out custom. A Law and Order Court in 1903, for example, was ordered by white agents to prosecute Navajo medicine men.

The law was what was backed by white man's power. Power to enforce the law and the law were the same thing. Until the last ten years, the implementation of criminal law was the primary and nearly exclusive role of the courts, and the implementation of the civil law which would help individuals with disputes languished.

The traditional way of resolving disputes emphasized repairing the damage caused, and not the handing out of punishment. An admission or acknowledgement of wrongdoing was assumed when the people sat down to discuss the case. This was not the way the courts were supposed to work. However, many early judges did act as though Navajos were guilty when arrested.

The failure of Law and Order Courts to give defendants an opportunity to deny charges against them or to defend themselves seemed to confirm the Navajo custom of not contesting the correctness of an accusation. But, while the judge would fine or jail a defendant, the headman or local leader would ask only that some restitution be made. Neither his experience with early law or with his own custom gave the Navajo a very accurate picture of the adversarial procedure, where emphasis is placed upon a finding of guilt or innocence of a man in court only after a complete telling of both sides of the case.

Law

"Law" (bee haz'aanii) in the Navajo language is distinguished from "a way of living" in the religious sense (nahagha) or in the sense of the way that people think or plan (nahat'a). Anglo law is not, then, a code that one addresses himself toward when he decides how to act or tells other people how to act, as it may well be for the middle-class white person. Navajos do not relate to Anglo law that way. Thus, while an Anglo might say to a child seen removing an object from a pickup, "Don't do that, Johnny. That is against the law," a Navajo might say, "Don't do that, son. That is not how to act."

Anglo law is best understood by Navajos as the forceful activity of the courts, the police, and others upon whom authority has been placed. It is descriptively the function of these institutions. It is not the business of ordinary people.

An individual becomes involved with the law mechanistically when someone "puts a paper in the court against him," or when he "puts a paper in against someone else."

The law is often thought of as identified with something powerful and tangible. Thus, when informed that the court has issued a restraining order, one is told that "the law has been placed on you (like a rope)." To carry that analogy abit further, not everyone has the capacity to throw the rope off.

Thus, a Navajo may say that he has "put a paper in" at the legal service lay advocate's office, because he believes that the counselor's role in the process of law is equal or, at least, coterminous with that of the judge.

One lay advocate says that he tells the client who labors under that misapprehension of the advocate's role that "the law has not been given to me." That is, he does not directly share in the tangible power of the court.

The System and Its Players - A Navajo View

Authority, "the right to say to someone," is placed upon an individual. It is not assumed, in the way that a medicine man takes up his calling. The analogies to medicine men that tribal judges sometimes draw for themselves are wrong in this regard, a crucial one, when one perceives the necessary tie between the law and the ability to enforce it, and the system of courts and jails in which it operates.

The court (gooldi) can be seen as possibly being derived from the Navajo word for Bosque Redondo or Fort Sumner (hweeldi), the American concentration camp in which the majority of the Navajo Tribe was imprisoned after the Long Walk. The judge ('anihwii'aahii) is the "one who issues punishment." The word for policeman (silao) is derived from one for soldier (tsilao tsoi). The Navajo cannot forget that his first encounter with Anglo law was as a prisoner of war.

The literal translation for judge is telling in two respects: first, in its emphasis upon the authority to punish and pass judgment, and not on the authority to judge the issue of guilt or innocence or the issues of law and fact in a case. Second, the word has an exclusive focus upon the criminal role of the court.

This view of the judge's most authoritative role is somewhat analogous to that of the traditional headman who sets matters right with the injured parties, and who dwells upon the facts of the injury only as they serve to mitigate or increase the award. It does not indicate the preliminary stage, in which the Navajo as plaintiff or defendant is expected to assert his legal claim through evidence or rebut evidence presented against him. Instead, the admission of guilt is seen as an automatic premise to a proceeding that is nothing more than the setting for arbitrary punishment.

The Navajo linguistic focus upon criminal procedure is borne out by statistics from the Law and Order and Tribal Courts. In the last year of the Navajo Courts of Indian Offenses, the courts handled 9,555 criminal cases, and 690 civil actions.[1] An anthropologist who studied the courts in the 1960s reported that one judge handled 2,216 criminal cases and only 275 civil cases.[2]

The relative absence of civil or private actions brought by one Navajo against another, or by an Anglo against a Navajo, in a private dispute is even more extreme when one considers that petty civil matters, such as validation of marriages by issuance of a Tribal license, divorces, and child custody or support actions are often brought in explicit compliance with the demands of welfare caseworkers. If public bureaucracies, such as the Social Security Administration or the welfare department, did not demand that the Navajo get these papers from the court in such civil matters, the Navajo would not have gone to court to get them.

Even today, when there is a great deal of legal assistance offered by the DNA program and the Tribe's own legal aid program to help Navajo people take their private disputes to the courts, only a small number of civil cases are brought, compared with criminal cases, about seven out of one hundred cases filed, approximately the same ratio as before the advent of complete legal services on the Reservation in the sixties. A Navajo term used in connection with civil matters (t'aa k'e bił naazdt'ije) retains this view of these problems as being between family members, or relatives both by blood or clan, matters that are settled according to Navajo law ways outside of the courts.

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[1] Davis, Lawrence. "Court Reform in the Navajo Nation," Journal of the American Judicature Society, Chicago (August, 1959)

[2] Shepardson, Mary. "Problems of the Navajo Tribal Courts in Transition," Human Organization, 24:3 (1965) pp. 250-253.

The Parties and Their Functions

The plaintiff is "one who puts the paper in the court" (naaltsoos yistsosigii). The defendant is "one who has a paper placed against him" (naaltsoos be siłtsosigii). The likelihood of a complaint being filed in court is less for injuries occurring within the family. Usually, Navajos do not see intra-familial disputes as matters for the court to resolve. They recognize that family members are still treated according to standards that would usually (traditionally) not be applied to non-family members. This distinction between the treatment of disputes between family (or clan) members and non-family members (traditionally referred to as "strangers") was clear in traditional determination concerning property or personal injuries, where family or clan members did not have to remunerate other family or clan members for injuries.

The distinction between criminal matters ('awaalya bił naazdt'ije) and civil ones (t'aa k'e bił naazdt'ije) indicates that criminal actions involve jailing, while civil actions involve kinship. The extended family and clan could traditionally encompass most of the interpersonal encounters that were both good and bad in the daily life of a Navajo. The use of civil cases nearly exclusively to obtain support and divorces (the welfare instructed acts for applicants) reinforce this view of civil cases as being family related.

Traditional punishments are nearly always described particularly, within the context of the wrong act. Thus, the lecture on conduct that might conclude a traditional session of dispute resolution is not an abstract recitation of "golden rules" but, rather, an empirical recitation and summing up of bad acts by the malefactor, along with a comparison of how a properly-acting Navajo might be expected to perform.

The word nalyeeh, a paying back or restitution, seems to be used today mostly in connection with what would be considered civil matters, but in the past this symbolic restitution was usually all that would be required of the person who committed a criminal act, as well. Nalyeeh, traditionally, has the power to correct wrongs of any kind. In the Navajo sense correction is not accomplished by jailing. It may even be inhibited. Who is paid back with a fine or a jail sentence? Traditional Navajo people do not perceive jails or fines as means of paying back anyone. The victim (and those who support him or depend upon him at home for support) is still injured physically or monetarily. The jailing or the fine are exercises in the force of Anglo law but do not in any way help or pay back those who have been wronged, *even* when the law defines the bad act as a crime according to its own terms.

It is hardly surprising that where removal from the sheep camp or community is actually the sought-after remedy, the catchall misdemeanor of "disorderly conduct" becomes the most common criminal complaint filed by Navajo people. It is the most "popular" crime, filed not necessarily because it best describes disputes and acts of violence that do occur on the Navajo Reservation. It is most popular because the Anglo law *works* in its resolution of disorderly conduct as a temporary expedient, though it *fails* to cure or to curb more harmful bad acts in ways that Navajo people comprehend or desire.

The extent to which the Navajo views himself as involved in the judicial process and, most importantly, in control of his original problem while it is meshed in the law is captured in language used to describe aspects of the judicial process.

The view of the plaintiff as "one who puts the paper in" and the defendant as the "one against whom the paper is put in" indicates the individual power to involve the law, yet a disengagement from the substance of legal arguments that have impact upon what happens in court. The Navajo expressions for trial ('ahwiinitį), "where a person is talked about," and proof, "making it clear or obvious" (ashjoni adoolniił), and jury, "six people sitting in authority (hasta dahnidinbiihigii), indicate those aspects of the trial that are most comprehensible to the Navajo--the verbal aspects. The pleadings' entrance and exit in a criminal case that the defendant loses, he sees as one where "my paper was thrown out," (shits'a ch'iheeł ghan) are perceived as crucial to the court's engagement with the problem and the focus of the court's power upon it, but are not comprehended beyond that.

The entrance of the paper by the individual points to another important characteristic of Navajo perception of the judicial process. The Navajo believes that the case he files is still his case. The case, or "that over which an argument has arisen" is perceived as personal, even when the complaint is criminal. So, too, the policeman is viewed as personally in dispute with the defendant when he initiates a complaint.

There is a notion that a case does have two sides. A burden of proof is placed upon one side by the court. However, success in court is not seen in terms of a weighing of proof on one side or another to a specific degree, such as the offering of a preponderance of evidence in torts or civil injuries or proof beyond a reasonable doubt in criminal cases.

The presentation of relevant facts or evidence is understood, though the purpose of evidence in an adversarial proceeding is not seen as "making something clear or obvious by means of words." An argument is "words" or an "exchange of words." Verbal evidence is seen as the representations that are the clearest. The role of other kinds of evidence, such as signed contracts or other authenticated records, are not understood, except as they are woven into a strong story that best shows what happened. The notion of best proof, or beyond a reasonable doubt, is described in Navajo as (t'aado naaki nilini), "that which is explained without giving the appearance of two things." The Navajo definition is particularly acute in this regard. So, too, hearsay (jini jini), "said someone else," is an accurately focused word.

In sum, verbal statements in a formal context are not foreign to the Navajo conception of Anglo-American justice as it is practiced in the court. Employment of a good speaker who can win the day with his speech fits within the Navajo conception of role playing and the particularly positive place awarded the speaker who wins arguments in Navajo.

Roles

When an adversarial system is not understood, functional descriptions for the denotation of courtroom roles convey this confusion. The prosecutor (yahi'i' iniiłi) is "one who places people in jail." "Advocate" or "lawyer" (aghaa'diit'aahii) is "one who always wins the argument."

The typical role of the policeman in Tribal Court or in local city courts as complaining witness and ex-officio prosecutor may have confused the role of the latter as it is defined in Navajo. No indication is given that the prosecutor is a representative of the body politic of the city, state, or Tribe. Rather, the focus of the term is upon the apparent power that he shares.

The definition in Navajo for lawyer reflects the Navajo people's view that he has the capacity to successfully shift the power of the law to the person that he represents. Unlike the informal family spokesman in courts and traditional forums, the lawyer or Navajo lay advocate seems to win in the fact of heretofore unchallengeable power in the court. While he may not win "all the arguments" he changes the outcome in a sufficient number of cases as to appear to be invincible to many people who had experienced the often-arbitrary "justice" before he came upon the scene.

A jury (hasta dahnidinbiihigii) is six people who help the judge. The power of the jury to decide upon issues of innocence, guilt, or liability is not recognized. Jurors are still people without authority or power of law at their disposal. They are ordinary people. The partial definition reflects the inexperience of most Navajo people with juries. Presently, the rare jury hearing is viewed pragmatically as a way to earn money for those sitting on it and as very little more than that. Jurors expect to be led by the judge. Judges often expect to lead jurors. Advocates are reluctant to engage the judges on the intermediary issues of selection and instruction in jury cases and are put off by the intrusion of clan relationships in a locally-picked jury. Advocates also believe that jurors may well view any arrested person as guilty to please the judge or policeman, especially in the pressure-filled atmosphere of the courtroom.

Trials are, as noted earlier (ahwiiniti), "where a person is talked about." Thus, a prospective client may tell a lay advocate, "At one o'clock, I will be talked about (in the court)." This description may also be used when speaking of a traditional conciliatory event.

The importance of preserving one's rights as a defendant, and of preparing one's evidentiary case, are not understood if one does not know what one is getting into. Many Navajo people do not.

Though an analysis of the Navajo legal vocabulary is necessarily many-sided, the key notion pursued in this description has been the potential for misapprehension of the adversarial proceeding, where two sides seek to refute the positions of one another in order to obtain the support of the judge or jury for their position only.

A legal argument requires words that are contentious and bad in the Navajo sense, since their goal is not to harmonize the situation. Bad words are, by Navajo definition, those of an argumentative or irrational nature. A reasonable man is a good man; one who acts reasonably is one who collaborates in ways that harmonize differences of view and do not exacerbate or underscore them.

An adversarial proceeding is not seen as good, as rational, or as useful by persons who see conciliation of differences as the immediate goal. Navajo people attempt to compromise differences among themselves. They do not make special or seemingly irrational efforts to reinforce their differences simply to "fight." And to "win." Getting straight with society is at the core of Navajo jurisprudence. For a participant, this implies that agreement with authority and pooling one's knowledge and demonstrated wisdom and not disputing the opinions of others are what the resolution of differences is all about.

As a practical matter, these differing expectations transcend mere differences in language. Nor are they merely amusing subjects for academic inquiry. They have to do with the strong differences between Navajo and dominant Anglo conceptions of "reason" and "unreason," especially as seen in legal contexts.

Was there sufficient cause to make the arrest? Is there enough evidence on the state's part to compel the defendant to rebut it? Was police procedure correct when that evidence was gathered? To these questions, the Navajo may well respond, "Why is this inquiry necessary?" He may arrive in court expecting the entire matter to be heard. Although he may personally question the necessity of the involvement of the judge or the Navajo Tribe or the City of Gallup and the prosecutor or police in his life, he respects their power to punish him. To question that involvement in his case, however, means to challenge their power.

The case of the State or Tribe must be supported by sufficient evidence to sustain a finding of "guilt" and, therefore, punishment. For a Navajo, guilt, or at least misconduct, as defined by Anglo law, is presumed when he is arrested or notified that he will be "talked about" in Tribal Court. A Navajo may well say, "Get on with it." The "it" is the important stage of the reconciliation of differences and the punishment that facilitates this reconciliation.

The phase of punishment through the courts also brings surprises to the traditionally-oriented Navajo. Some individuals are not punished, although the matter has been set before the court Others are fined or jailed, although this does little or nothing to correct the impact of their misconduct upon the community. In the court, neither "guilt" nor "innocence" result in appropriate action to compensate the victim of a crime or to set the wrongdoer back within the community as a person who has now seen how he should act.

Solutions

Bilingualism, the rise of linguists or capable interpreters, is a reform that is much needed in state courts, but is not one that will, by itself, guarantee legal rights to Navajo people or that will make legal rights and opportunities comprehensible to them. A bicultural interpretation of law by individuals who are capable of functional descriptions of the legal process from a traditional perspective seems to be the only solution.

The Navajo legal vocabulary, as it stands, is inadequate and distortive of the legal process, because Navajo experience with law and legal process has been similarly skewed and distortive. It must be reworked and embellished with more sophisticated explanations of the legal system, or it will continue to retard the clear understanding needed by Navajo people if they are to receive full justice through the Anglo-American legal system.

ROLES AND NAVAJO LEGAL INSTITUTIONS

Some people never do go into a courtroom in their whole lives. They may never even speak to a policeman, not to mention a judge or a lawyer or advocate. Some people, as defendants or as plaintiffs, may deal with the legal system once in a while. But certain people work with the law every day, because they are policemen, judges, or lay advocates or lawyers. What follows is an analysis of the jobs these people and the institutions within which they work.

THE NAVAJO TRIBAL POLICE

The Early Navajo Police

Before the captivity at Fort Sumner, Navajos had no formal "law and order" organizations. The people themselves took care of any disagreements or wrongdoing that arose among them, and there was no thought of relying on anything at all like a police force.

Soon after the Navajo people returned to their own lands, however, the federal government came to believe that there was a strong need for some system of law and order. It was concerned about one trouble in particular. Though the federal government had promised the people regular food rations, it was often behind in giving them out, and food was very scarce. The people tried to provide their own food as best they could, but there were four years of drought and poor crops. Rather than starve to death, many Navajos began going outside reservation borders to take sheep and cattle from the white settlers for food, and this made a problem for the government.

In 1870, W. F. M. Arny, Special Indian Agent, recommended to Washington that a police force be set up on the reservation because, he predicted, if the raiding situation continued, it would "result in the ruin of the settlements in New Mexico and finally cause a war that will cost millions of dollars to the government."

In 1872, General O. O. Howard, Special Indian Commissioner, ordered the recruitment of about a hundred young Navajo men, and placed them under the command of

Manuelito. Their duty was to recover livestock taken from the white settlers.

Among these new police were many headmen of the people. The new policemen provided their own horses, and the Indian Office supplied guns. They were paid $5 a month by the government, at a time when Navajo butchers and herders working for the army were receiving $45 and $15 a month, respectively.

The new police were so successful at stopping off-reservation raids on livestock that first the government in Washington cut their number down to thirty, and then it decided to disband the new police force entirely.

Unofficially, Agent Arny kept thirty men on the job without government consent, and managed to pay them for a while from extra goods and rations on hand after the annual government issue to all of the members of the tribe.

Only a few years later, in 1883, the US government again hired men of the people to be police, under the leadership of Chee Dodge.

Because the agents of the government usually could not speak the language of the people to whom they were assigned, the police were eyes and ears for the agents, as well as helping hands. Of all the work assigned to the early police, some was helpful to the people, and some was definitely not. In any case, the police were usually looked upon with disfavor by the people, because they were not answerable in any way to the people. They were arms of Washington's will and power, and responsible only to the outsiders for the job they did.

The early policemen performed many chores for the government men in charge, tried to preserve "law and order," and served in some ways as agents of the government "civilization" programs. To them were assigned such tasks as killing beef cattle for the meat ration, taking the census, building roads, and carrying messages. One of the major jobs of the early policemen was to help round up children to be sent to fill government boarding schools, whether the children's parents gave consent or not.

Needless to say, many Navajos were reluctant to become policemen for the agents. This can be seen from what Old Mexican had to say about it. Old Mexican was a Navajo whose life story was written down in a book, as he told it. Shelton, the white Indian agent at the time (about seventy years ago) asked Old Mexican to work as a policeman. According to Old Mexican, Shelton told him that, "we will be wanting some school kids pretty quick. You can go around the camps and get the children from the people. You know the people and where all the camps are. That's why he wants you for his policeman. And whenever a man, or a woman, gets in trouble you go around with Holley and settle it. If it's all right with you, we'll give you pants, coat, vest, and badge. These policemen around here are doing lots of work. They get forty dollars a month.' I told him, 'I don't know. It's pretty hard for me to say. I'll have to tell my folks about it first.' 'Your folks don't give you anything,' he said, 'what do you want to depend on your folks for? I'm the one that is going to take care of you, give you money, a suit, and good clothes to wear.' One of the men got up and said, 'He is already chosen to be a foreman. He can't do two things at once.' 'That doesn't matter,' Shelton said.

'I want the money all right,' I said, 'but the thing I don't like about being a policeman is that the Navajo are pretty hard and ornery.' 'You talk pretty good,' he said to me, 'You don't have to be cranky or hardboiled with them. I think it will work out all right.' I said, 'If you don't get hard with them they will just get worse, and tell all kinds of stories on you, just as they are doing about Sandoval [another policeman]. They say Sandoval goes around visiting women, telling lies, stealing, and that he is a crook. That is the way they will come and tell you about me, if I become a policeman.'

I didn't like the job of policeman anyway. I wasn't figuring on taking it. Slow [another Navajo] said, 'If you don't like the job, why don't you speak up and tell him you don't want it. That's the easiest way to get out of it.' Then I told the whole crowd and Shelton that I didn't want it. 'I don't even feel like trying,' I said. That settled it. Shelton didn't say another word to me."[1]

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[1] Dyk, Walter. Old Mexican: A Navaho Autobiography. New York: The Viking Fund, Inc., 1947, p. 121.

People didn't like having their children hunted down to be sent off to school and they resented it so bitterly that on at least one occasion there was a major uprising on the Navajo Reservation over it, when Indian Agent David L. Shipley took three other Anglos and seven members of his police force to Round Rock to get some children for the schools. The people there refused to give up any of their children to be sent far away, and the angry parents beat up Shipley and all of the men with him.

Although miserably paid and poorly equipped and uniformed, the police early demonstrated their value to most agents, performing the multitude of services summarized by Secretary of the Interior Carl Schurz in 1880:

> "...acting as guards at annuity payments and rendering assistance and preserving order during ration issues and protecting agency buildings and property; in returning truant pupils to school; in searching for and returning lost or stolen property, whether belonging to Indians or white men; in preventing depredations on timber and the introduction of whiskey on the reservation; in arresting or driving off whiskey-sellers, horse and cattle thieves; in making arrests for disorderly conduct, drunkenness, wife-beating, theft, and other offenses; in turning over offenders to the civil authorities; in serving as couriers and messengers; in keeping the agents informed as to births and deaths in the tribe; in notifying him of the arrival on the reservation of strangers--white or Indians, in accompanying and protecting surveying parties; and in general, such other duties as in civilized communities are intrusted to an organized police force."

And through the years, the federal government regularly relied on Navajo policemen to carry on all these activities, and more.

In 1934, representatives of the Tribal Council requested permission from Washington to form their own police corps, in addition to policemen hired by and supervised by the Indian Service. The Tribal Council felt that the wages being paid to Emergency Conservation workmen (paid by Washington, under one of the government depression programs) on the reservation were attracting too many bootleggers, gamblers, and so forth, and making a problem too big to be handled by the available policemen alone.

Permission was granted, and thirty men were appointed by the federal government, to be paid from Emergency Conservation Work funds. These men were selected by Navajo chapter officers and were answerable not only to the US government, but also to the Tribal Council. They formed the Navajo Mounted Police and were considered to be very successful, but their number was reduced as federal monies to pay them grew less, and finally they were disbanded.

According to a report to the US Senate, prior to July 1, 1936, Indian police were paid extremely low salaries. Officers were paid about $75 per month, and privates were paid about $45 per month. In 1936, Congress raised the Indian police salary brackets, "permitting the payment of larger salaries which will attract higher type Indians". In the 1930's, police often had to use their own cars or trucks, with the government only paying for gas and oil.

There was little progress in the conduct of police activities during World War II, because the country's monies and attention were directed elsewhere.

The Modern Navajo Police

Navajo Police were hired and paid entirely by the Bureau of Indian Affairs up until 1953. In that year, the Navajo Tribe paid for six of the Navajo police. This was a beginning. Then, on July 18, 1958, the Tribal Council proposed to take over complete responsibility for direction and expenses of the Navajo police. After amendment, on January 6, 1959, the proposal was accepted by the Secretary of the Interior. So, in 1959, the Navajo Tribe took over the administration of its own police department, and has paid the expenses connected with the police department ever since.

Functions of the Navajo police department follow, as described in the Navajo Tribal Code. The police department shall be responsible to the Tribal Council and its chairman for the planning, organizing, and administering of Navajo law enforcement, including the direction of work assignments and distribution of personnel at their various stations. The department is responsible for the investigation of both routine and more complex criminal cases and the preparation of reports required for presentation and disposition of cases in the court of jurisdiction; for preparation and maintenance of an adequate police records system; and for training of police personnel through various media. It shall provide the Tribal Council and other officials technical assistance as requested.

The department enforces all misdemeanors and traffic regulations, which include federal, state, and tribal codes. Major crimes committed on the Reservation are investigated by the Navajo police as a first step and then turned over to the FBI. The department is also responsible for the housing and care of prisoners incarcerated in tribal jails. Patrolmen are assigned to attend council meetings and are required to provide peace and order during the meetings. All traffic accidents on the Reservation involving Indians are investigated by the Navajo police. All special events which occur on the Reservation, such as rodeos, basketball games, movies, dances, and ceremonies are patrolled by the Navajo police. In addition, they provide special services such as emergency ambulance service and delivery of messages to isolated areas on the Reservation.

The present-day Navajo Police Department is a highly-trained professional police force which patrols the huge land area of the Navajo Reservation. The reservation itself covers 25,000 square miles, and, in addition, the police must patrol 3,000 square miles of allotted or tribally-owned lands in New Mexico. This land contains 972 miles of state, federal, and county road, and over 3,000 miles of road maintained by the BIA. There are 101 communities on the Reservation, with populations ranging from 284 to 4,462 people at the last count, for a total Navajo population of about 135,000 people. In other words, the Navajo police are responsible for serving one of the largest areas of any police force in the country, if not the largest.

The Navajo police, with an annual budget of more than two million dollars, have 206 positions, including 176 uniformed personnel. The police work out of five district stations, in Window Rock, Tuba City, and Chinle, Arizona, and Shiprock, and Crownpoint, New Mexico. Each district station has responsibility over a number of two-man substations. Many of these substations are located fifty miles or more from the district station.

Because the Reservation is so huge and the roads are so poor, it is difficult for public services to reach the people, so the police are asked to perform many services and help in many ways that usually have nothing to do with a policeman's job. They carry messages and do many jobs for the Public Health Service, the BIA, and many departments of the Tribal Government.

The police must be on duty at social functions of many kinds, and Navajo dances, and ceremonies, where there may be hundreds of people. If there is trouble, a policeman cannot count on anybody else for help, because of the distances involved, the poor roads, and the lack of communications facilities, such as telephones.

The Navajo Police Fight for Better Conditions

Recently, because of the important job that they have to do, and the hard conditions under which they have to do it, the Navajo tribal police banded together to try to do something about their situation, and make it better. This was in September of 1971. They wrote up a list of the things they thought they needed to help them do their job right, to be presented to the Tribal Council. 130 out of 176 uniformed Navajo policemen signed their names to this list of things they wanted. Right before the Tribal Fair in Window Rock, a time when they are really needed, they said that they would go on strike, if necessary, to call attention to their problems and to help them get what they were asking for.

These are some of the things they asked for:

1. MORE PAY. The money paid for Navajo police to do their jobs is lower than for other police forces in the area.

STARTING SALARY FOR POLICEMEN PER YEAR

	No. Uniformed Men	Patrolmen	Sergeants	Lieutenants
Navajo Police	176	$6,149	$6,721	$ 7,293
Albuquerque Police	370	7,272	8,460	9,864
Arizona State Police	407	6,073	9,012	10,007
New Mexico State Police	275	7,560	10,200	10,800

2. PAY FOR OVERTIME WORK. The Navajo police work in eight-hour shifts. But because there are not enough policemen and there is so much work to be done, policemen often have to work for twelve to sixteen hours a day, seven days a week. And they often must go out in the middle of the night to take care of emergencies. Because they are not paid for this extra work, they are really giving hundreds of hours of their time for free each year, without even being given the same amount of time off to make up for the time they have given.

3. A UNIFORM ALLOWANCE. The police are required to wear certain clothes and carry certain equipment while they are working. When they first come to work as policemen, they are given a set of these things. As these things wear out, though, the men must pay to replace them out of their own pockets. To replace all this clothing and equipment at one time would cost about $515. The police asked for a uniform allowance of $300 a year, to be in addition to their pay.

4. HEALTH AND ACCIDENT INSURANCE. Most jobs these days provide medical insurance, so that if people get sick or have an accident, they don't have to pay for the medical costs themselves. The employer pays some of the cost, and the worker usually pays some. The police, who in doing their work are more likely to be hurt than other people doing other jobs, have no medical insurance to protect them.

5. A RETIREMENT PLAN. The police asked for a pension plan, so that when they retire, they will have some reward for all the years of service they have given. Now, there is no plan for this.

6. A BIGGER POLICE FORCE. The men said, "Our people are growing rapidly in number, and the need for police services in the Navajo Nation is expanding at an even greater rate; yet our force has grown at a snail's pace, and today, even at full strength, we are unable to serve the needs of the people effectively. And because of our poor salaries and working conditions, we cannot attract enough new recruits to fill available positions. This causes an even greater demand on our present personnel, and makes our jobs much more difficult and burdensome than they would be normally."

In addition, the police asked for such things as to have old equipment and facilities replaced, to have a place provided for men to live in who are assigned to work away from their homes and families, and to have a committee set up to hear policemen's complaints and deal with them so that they don't have to make up a list of demands and threaten to strike like this to be heard in the future.

These demands were all saying that the policemen cannot do their jobs well under such hard conditions. And that many of their demands are justified can be seen from the fact that the Tribe has not been able to persuade people to take all the jobs that are now open on the force.

A strike is a stopping of work by employees in support of demands made to their employer, as for higher pay or improved working conditions. This is what the dictionary says. When people strike, they are not paid for the days when they strike.

In August, the police complained to the Tribal Council about their working conditions, and no one did anything to improve them. The police felt that no one was even listening to them. So, on the first day of the Tribal Fair, nine out of ten of the tribal policemen did go on strike for this one day.

And their strike worked. Things began to happen. Chairman MacDonald took the first steps toward beginning to set up a retirement plan, one that would be for all Navajo employees. The Tribal Council passed a resolution approving a uniform allowance. The amount of money given was not as much as the policemen asked for, but each man will be provided with probably at least $100 a year to help him replace clothing and equipment. A formal resolution on salary raises has been made for consideration by the tribal budget and finance committee, but nothing has been decided about it yet. The right overtime pay for extra work was recently granted. Nothing has been done about some things. However, most of these questions are at least being considered, where they were not, before. The strike was this effective.

Many tribal councilmen disapproved of the fact that the Navajo police used the method of a strike to push their demands. They thought that the police, as employees working for all the people, and providing an important service on which people's lives sometimes depend, should not walk off the job.

There are some questions to be thought about here. Are strikes legal? Should they be used by people who work to provide the public with important and necessary services? Do strikes work? Do they make more bad feelings than they are worth? Was this strike justified? If you were a Navajo policeman, would you have gone on strike? Or would you have been one of those who stayed on the job? If you really needed money at the time, and couldn't afford a day without pay, and yet, you thought the police demands were very important to you in the long run, would you still have gone on strike? (Strikes only work if most of the people involved do not go to work. If there are a hundred people who might go on strike, and only fifteen of them do, and the rest of the people go to work, the strike will not work.) Do you think it would be hard to organize people together to work for better job conditions? In what ways might it be hard to do this? Would it be hard to organize a strike? If so, why?

Police Conduct and Responsibility

When Old Mexican refused to be a policeman, he did not tell the Indian Agent exactly why he refused. One of the main reasons was probably that taking children from their parents' hogans was the biggest job of policemen in those days, and Navajo people who did this were hated and feared by other Navajos.

Old Mexican also says that people said bad things about Sandoval, another Navajo policeman. This was a roundabout way of telling the agent that Sandoval used the law for his own personal good. Even in those days, Navajo people saw that the law could be misused if the judges or the agents did not look at the way policemen behaved, as well as the behavior of the people they arrested.

Policemen and judges have a very heavy responsibility. When they are given the authority of the law to apply, they are acting for all of the people.

Policemen have the same rights and duties under the law as other Navajo people. This is why policemen who are working under bad conditions have the right to get together to change things, and even to stop work (strike) in order to protest their bad working situation.

Policemen also have specific jobs to perform. Their main job is to arrest people who are accused of crimes and bring them to jail. They do not decide if a person is guilty. The judge does that now. The agent did it in the old days. Police do not punish the person they arrest. The person is only punished if the judge finds, after listening to both sides of the story, that the person is guilty--that he broke a law. The policeman does not decide what punishment should be given to guilty people. The judge does that.

The policeman makes an arrest when he sees what he thinks is a crime being committed, someone breaking the law. Or he acts because someone else files a paper in the court. But only the judge will decide if a crime has been committed and if a man should be punished.

When a policeman makes an arrest, he cannot do things that are themselves against the law.

HE CANNOT ENTER A PRIVATE HOUSE TO LOOK FOR PROOF WITHOUT PERMISSION FROM THE PERSON WHO OWNS IT, OR WITHOUT A PAPER SIGNED BY THE JUDGE THAT TELLS EXACTLY WHAT HE IS LOOKING FOR, WHAT CRIME HAS TAKEN PLACE, AND WITHOUT TELLING THE JUDGE WHAT GOOD REASONS HE HAS TO BELIEVE THAT THE PROOF IS IN THAT HOUSE. Just because he is a policeman, that does not give him the right to go into the house without permission or a paper from the court (called a search warrant or an arrest warrant). The owner does not have to give a policeman permission to come into his house, and he can't come in without it.

For example, Officer Yazzie has heard rumors that Mr. Begay is keeping some peyote in his hogan. So he goes to the Begay hogan, breaks down the door, and finds the peyote. Will Mr. Begay be found guilty for possession of peyote in court?

No. If the judge acts correctly, he will not accept the peyote as evidence, or the testimony of the policeman about it. This is not because possession of peyote is not a crime. It is a crime. It is because the judge learns that Officer Yazzie did not act correctly. The courts have decided that it is more important to make sure that policemen act correctly than it is to punish a guilty person, in cases like this. They realize that it is just as necessary to protect the Navajo people from policemen who act illegally as it is to protect the people from ordinary people who commit crimes. They have found that the only way that all people can be protected and police conduct will be correct, is to turn the guilty person free if the policeman does not act correctly.

A POLICEMAN WHO ARRESTS PEOPLE MUST ADVISE THEM OF CERTAIN THINGS. HE MUST TELL THEM THAT THEY DO NOT HAVE TO TELL THEIR STORY TO HIM OR TO CONFESS ANYTHING TO HIM. THIS IS A LEGAL RIGHT. THE ARRESTED PERSON HAS A RIGHT TO KEEP QUIET. ON THE NAVAJO RESERVATION, HE ALSO HAS A RIGHT TO HAVE A LAWYER IF HE WANTS ONE. THE POLICEMAN MUST TELL THE PERSON THAT ANYTHING HE TELLS THE POLICEMAN CAN BE USED AGAINST HIM.

Many Navajo people do not understand these warnings. They think that because the policeman is acting under the law of the Tribe, he is an important person, and they have to tell him whatever he asks. THIS IS NOT TRUE. People say, "Well, I must be guilty, because I was arrested. So I'll tell him everything he wants and get it over with." This is not right; only the judge decides who is guilty.

When you're arrested, the smart thing is, to:

1. Be polite, but

2. KEEP YOUR MOUTH SHUT. TALK ONLY TO THE LAWYER OR TO THE JUDGE WHEN YOU GET A CHANCE TO TELL YOUR SIDE OF THE STORY.

An arrest is only the beginning of the test of whether or not someone has broken a law and should be punished. It is also the beginning of a test of whether or not the policeman has acted correctly.

POLICE BRUTALITY

A young Navajo man at Crownpoint charged in 1969 that his civil rights were violated when Navajo policemen acting as deputy sheriffs beat him without reason after he was arrested.

The young man sued in federal court, and the jury awarded him over a thousand dollars to pay him for the trouble caused him by the conduct of the policemen.

Policemen may not use excessive force even when they are empowered by law to make an arrest. Their job is not to punish.

THE COURTS AND THE JUDGES

The first formal courts for Indian people on the Navajo Reservation were the Courts of Indian Offenses, organized in 1903 by the Bureau of Indian Affairs. The Indian agent controlled them, although Indians had been used informally since 1882 as judges.

Courts of Indian Offenses had jurisdiction over matters presented by the Indian agent, meaning, in practice, that they were used to support his attempts to maintain law and order. The courts also assumed jurisdiction in civil cases--using rules and procedures of the neighboring justices of the peace--and went beyond the commonly recognized scope of crimes to punish Indians who pursued some of their ancient practices. There was no freedom of religion for Navajos. It was an offense for them to engage in "native religious ceremonies," and one of the main assignments of the court was to enforce a new act against anyone "operating as a medicine man." As soon as the Tribe began to have any say as to how their legal systems were run, they were encouraged to copy state laws, use state and local law enforcement officers when possible and "hire non-Indians if educated Indian judges" were not available.[1]

The chief variation in the courts from 1882 to 1935 lay in which Anglo controlled them. In the early days it was the white agent or the superintendent. Later, it was a white law enforcement officer for the Bureau of Indian Affairs.[2]

Between 1951 and 1959, the judges were elected by popular vote. Many Navajo people approved of this, since it allowed them to select judges who were close to their own beliefs about justice (see the Jeanette Saunders interview in this text).

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[1] Hodge, Carle, and King, William S. Indians and the Law, American Indian Series Number Two, Bureau of Ethnic Research, Tucson: University of Arizona Press, 1958.

[2] Shepardson, Mary. "Problems of the Navajo Tribal Courts in Transition," Human Organization, 24:3 (1965), pp. 250-253.

However, in 1959, the Tribal Council, rather than risk having the states take over law enforcement on the Reservation, passed a resolution for the Tribe to take over law and order functions, both administratively and financially.

A tribal judge sits in each agency, and some ride circuit into outlying places to hold trials. There is a Chief Justice who, with two other tribal judges, hears appeals.

The chief benefit of the takeover of the Tribal Courts by the Tribe has been to make more uniform the rules for practice in the courts. A second benefit is that control has been removed from whites.

This does not mean, though, that the Tribal Courts have moved to reinforce Navajo legal ideas, as opposed to Anglo ones.

Note: As lay courts regionally situated conducted in the language of the parties before it, the tribal courts provide judicial relief which is superior to that available to other cultural groups in the United States who find themselves in the lower echelon courts in the state and municipal systems. pervasive racism, unprofessional conduct, and cultural insensitivity that other minority groups contend in the lower courts have been substantially alleviated by tribal courts for Navajo people. There is no question that a hearing before the Crownpoint Tribal Court is substantially fairer with a Navajo lay judge than with a white lay judge in the municipal courts of Farmington or Gallup, two nearby reservation bordertowns.

The intent of this analysis is not to compare tribal courts with comparable institutions off the Reservation that are comparatively weaker forums for obtaining justice, but to discuss tribal courts critically within their own environment, the Navajo environment, with its extensive admixture of white, transitional, and Navajo cultures. Although critical in tone, the intent of this analysis is to point to ways that tribal courts could become even more effective as forums for the just resolution of disputes of Navajo people.

Development of the Courts

In a study of the influence of traditional perception of law by Navajos as they engage in the dispute resolution process offered them by the tribal courts, it is important to place the tribal courts along the continuum from Navajo law ways to formal state and federal law.

Historically, the tribal courts are the descendants of the Law and Order Courts, instituted to aid the white agent in his implementation of white man's law on the Navajo Reservation. Native judges and native police in their original form were perceived as the agent's Indians. The law that they implemented was criminal law, but, even more importantly, the law they forced was white man's substantive law, a public law with public penalties that was without precedent in Navajo society. While this description may seem overly harsh, it has been reemphasized in field work as our Navajo informants described the courts and the law that they implanted as tied to the same locus of power--the white man and his institutions.

In the 1950s the Navajo Tribe formally took over the judicial system. However, the training of judges remained in the hands of the Bureau of Indian Affairs employees and outside legal authorities with little or no comprehension of Navajo customary law. Many of the judges were formerly members of the police force that had been an arm of the Bureau of Indian Affairs. Their only experience with law was criminal law that was inherently white man's law. Some were "missionary Navajos" and were negatively removed intellectually from an appreciation of presently-accepted Navajo law ways. In the formal training that was undertaken by the lay judges in the early years, a recurrent theme in the speeches made to them by law professors was that the judges stood between the Navajo on the reservation and the implementation of state law through state courts upon the Reservation Indian.

TRIBAL JUDGE TRAINING SESSION

THURSDAY, June 23, 1960

Presiding: Harry L. Stevens
Assistant Area Director (CS)
Bureau of Indian Affairs
Phoenix Area Office

For a number of years it has been the custom of Indian Tribes to pattern after State laws. Some Tribes have enacted ordinances setting up certain portions of the State Code as their own. The interest manifested by the University of Arizona here in Indian problems, to my notion, is a very forward step, especially this kind of interpretation of State laws and procedures. It is this kind of assistance and receptiveness which will show the Indian people that they are part of the State citizenry.

PART II: THE TRIBAL COURTS IN PARTICULAR

WHY TRIBAL COURTS

By Z. Simpson Cox

Mr. Cox: The first talk of the morning was "Why Tribal Courts" by Z. Simpson Cox, Attorney, Phoenix, Arizona, who is also Tribal Attorney for the Gila River Indian Community.

You are faced with the situation that the Supreme Court said in Williams v. Lee. Congress has followed a policy eventually to make all Indians full fledged participants in American society. This policy contemplates civil and criminal jurisdiction by any state willing to assume the burdens that go with it. As soon as the State assumes jurisdiction, you are going to be under it. Your courts today act as an educational process. If your courts are not operated as nearly parallel to the State system as you can make it, and more and more begin to get that way, when the State decides to assume that jurisdiction - some night at midnight - after that time you will be under a state system. If that state system is entirely strange to your people, it will cause great disruption on your reservation. I hope that the states and counties involved will make of your reservations just as other jurisdictional precincts so that there will be no disruptions when that day comes. I feel sure that it will come in Arizona within the next 20 years. The U. S. Supreme Court says that they can do this as soon as the education, status, and needs permit "without disadvantage to the Indians." It will not come for those reasons - but it is my opinion that that change is going to come within a very few months after the State of Arizona or New Mexico, or any of the other States can see that it will put dollars into the State Treasury. This is not going to be something you will use, with your consent, with your consultation - in my opinion - but the economic dollars will be weighed against the cost and the income derived from Indian assets. It might be curtailed for a period, but that period will not be long. The moral will of the people can curtail for a short period, but the economic pressure groups who keep consistently with their public relations people will sooner or later win their economic point.

This theme did reflect partially the legislative reality of the legal status of reservation Indians when it was enunciated. At that time, the states had the option to take over civil jurisdiction on the Reservation without prior permission of the Tribe. However, an amendment by Congress in 1968 changed this. At present the Tribe must give its consent to this assumption of jurisdiction by the states. Furthermore, case law, notably Williams v. Lee, has guaranteed to the tribes exclusive jurisdiction over civil matters that arise upon the reservation and that are crucial to the process of self-government.

However, wellmeaning, the enunciation of this theme that tribal judges should meet the standards of state judges, and follow the usage of state judges, state procedures, and state law as models, had the ultimate effect of encouraging the implementation of state law and state process as the substantive law and procedural process upon the reservation as a necessary requirement for meeting the standards of law and order demanded by state and federal officialdom.

The codification and enunciation of custom as law was given lip service but not meaningful encouragement. Judicial advisors and tribal attorneys instead retreated to encouragement of informality at states of litigation that the advisors, apparently thought would allow the tribal court to implement traditional Navajo ways, concepts of harmonization that the advisors had heard about. Unfortunately, this informality was usually at the expense of the defendant. It was made clear to judges that it should not diminish their role as an authoritative figure.

If residents entered the tribal court with the expectation that the judge was a kind of substitute for the traditional third party leaders who was by definition personally involved with the individuals who came before him with their problems, this image was discouraged. The tribal judges were encouraged by those who trained them to become impersonal and authoritative figures.

The traditional idea of private symbolic compensation for injuries was not to be substituted for penal sanctions provided for in the criminal law. Instead, any informality that existed usually involved such matters as the way in which the defendant presented his case to the court or that evidence was presented against him. Legal representatives for defendants were explicitly excluded.

This allowance for imformality could not allow for the introduction of Navajo law ways in any sense that would relate the implementation of law to Navajo conceptions of justice or Navajo ideas of right and wrong.

The headman was a clan member with immediate knowledge of the character of the individual wrongdoer. The net effect of a conciliatory process undertaken by this person, who was privy to all of the facts of the injury, as well as the capacity of the injurer to pay, was to achieve a result that was fair. The removal of legal procedural opportunities for the judge to weigh evidence that was known to him personally had the evident result of denying procedural fairness to the defendant by any standard.

An example of this attitude is the position which those who trained judges took toward the use of representatives of parties. So concerned were they to create judges as figures of unchallenged authority within the courtroom that the utility of lay representatives as cultural intermediaries for the defendant in a forum strange to him was not recognized. Representatives were treated with condescension and even contempt.

The lack of understanding of the role of legal advocates in the tribal courtroom continues to the present day. Judges occasionally inform representatives that they must know the law, or succinctly, that attorneys and Navajo advocates should represent the clients. This point of view is influenced by several factors.

The first is that the Tribal Code and Tribal statutory law, with few exceptions, has been drafted by attorneys who have simply borrowed the statutes that are extant in the state and federal systems. For example, when juvenile problems became an aggravation to Reservation society in the late 1960s, a juvenile code was instituted. While it is a model code for juvenile law as conceived by national authorities, it was modified not at all to conform to Navajo expectations of young people and their role in Navajo society. The fact that it was borrowed by its authors is made embarrassingly evident by passages that would indicate that all juveniles and not Indian juveniles only on the Reservation are subject to it.

Other examples, cited in years passed by anthropologists and others who were privy to Navajo law ways but who did little or nothing to advise white bureaucrats how to relate to the transmission of property in a matrilineal system, the use and ownership of land in Navajo society, familial relationships and expectations, and, finally, the expectations for compensation in case of injuries.

It seems fair to say that Navajo leaders were badly advised in their wholesale acceptance of Anglo-American common law. Clearly, they have not been shown the opportunities available to them to change that substantive law to meet expectations of Navajo people that were still relevant to them on a day-to-day basis. The theme enunciated at the judicial training sessions and the portrayal of white law as the law had clearly the contradictory effect of convincing sincere and perceptive Navajo leaders that acceptance of Anglo-American substantive law was a requisite to maintenance of Tribal independence from intrusion of the state and federal systems. This is the portion of the termination policy that remains most harmful and most pervasive.

The assumption of state and federal letter law as Tribal law meant that judges were necessarily more dependent upon Anglo attorneys as advisors. With the introduction of fairly regular representation by lay advocates, the courts have been placed under even more pressure to conform with a process that remains foreign to Navajo people who need help with their disputes. Consequently, there is a desire by the judges to have attorneys and not Navajo lay advocates in the tribal courtroom to guide this process.

The unique development on the Navajo Reservation of lay persons who (not only) are trained in Anglo law by attorneys who do not seek to compromise due process with a false and compromising informality, but who are also sensitive to the fact that the cultural expectations and choices of their clients present a threat to judges who have been trained to apply Anglo concepts of law rigidly and authoritatively.

The lay advocate forces the tribal judge to reconsider his application of borrowed substantive law. If he is well-trained, and his clients desire them to be brought into play, he attempts to persuade the court to apply the techniques of reconciliation of wrongdoers with the community that continue to be used outside of the courtroom with greater success than the use of Anglo fines and jailings as a curb on misbehavior. Yet a firm grasp of traditional techniques of correction does not inhibit the lay advocate from offering complete representation to his client. This includes a complete examination of evidence presented against him and the presentation of his own case in a competent manner. Anglo-American concepts of due process can be meshed with traditional ideas of remuneration and reconciliation that will satisfy the aggrieved parties who seek justice in a Navajo context.

The judges have been trained to apply non-Navajo punishments despite their own recognition that these punishments often work great harm on family members, who suffer economically from fines or the removal of the wrongdoer on whose labor in such tasks as hauling water or grazing they depend.

The lay advocates who have applied to be judges are rejected despite their superior training in law and custom.

Ironically, so rigid has been the training of Navajo judges that changes in state and federal procedure that could benefit Navajo people and lead to greater flexibility in the disposition of their cases with due consideration to their particular economic hardship are rejected by them as "threats to sovereignty."

For example, Boddie v. Connecticut, a Supreme Court decision, stated that women who are impoverished should be able to file for divorce without paying filing fees. Another Supreme Court case, Tate v. Short, allows impoverished criminal defendants to have fines waived because inability to pay a fine is considered discriminatory against poor people when the only alternative is a jail sentence.

Although the judges have been informed about these decisions, they often reject them for no better reason than concern for the continued financial support of filing fees and fines. This rationale must be expected from a lowly justice of the peace who earns a living from these revenues. Yet the judges, who are paid by salary and appointed for life, cannot bring themselves to use these decisions, which will extend justice to the poorest segment of the Navajo people without doing unnecessary harm to family members who are not immediately involved but who are traditionally expected to contribute monetarily to clan members in trouble.

The Indian Civil Rights Bill, with its requirement that defendants be allowed attorneys without charge in criminal cases has been criticized by writers unfamiliar with the evolution of the tribal process, as another federal intrusion upon the tribal process of adjudication. Ironically, however, the tribal judges are prone to argue for representation by attorneys rather than by lay advocates who are also Navajo-speaking people. The Anglo attorneys ignorance of Navajo customs gives to the tribal judges a leverage for maintaining authority that they do not have with lay advocates since many attorneys will defer to the superior wisdom of tribal judges on issues of custom when lay advocates will not.

Problems rooted in custom are actually turned away by some tribal judges. When a lay advocate attempted to file a divorce complaint in 1970 against a Navajo spouse who had been married in a customary ceremony, the clerk of the court and then the tribal judge reviewed the complaint and then refused to allow it to be filed because the couple had no marriage license.

The lay advocate requested the judge to simply hear and dismiss the complaint so that he might appeal it. The judge refused.

The lay advocate requested a paper from the court of appeals to order the tribal court to hear his client's case. Although the judicial advisor, an attorney, agreed that due process and the validity of the tribal custom marriage required access to the court, the Chief Justice refused to order the other judge to hear the case because he said that it "wasn't nice" to order a fellow judge. The lay advocate was instructed to file an action in the lower court in Window Rock but only if his client could furnish a valid license.

The case (Martinez v. Martinez 1970) illustrates more than ignorance of due process on the part of the judges. There seems to be a concern with ending customary relationships, a concern implanted by welfare and social security institutions and others who are also demanding from Navajo couples documentation that was rare twenty years ago. The imperfect lesson that these judges had received at an earlier date was that none of the states surrounding the Navajo Reservation recognized common law marriages. Customary marriages were considered by these judges to be no more than common law marriage and, hence, to be officially written off. The thrust of this decision was more than racist, it promoted the termination of cultural ties that have no present substitute for older Navajo people. To the woman who sought the divorce it was yet another example of the conclusion that many Navajo people have reached: that white man's law and its institutions cannot encompass the problems of Navajo people that are customarily defined and resolved in other ways.

The equation of mere procedural informality with customary fairness and substantive customary law has been a constant point of misapprehension by outsiders as they viewed the tribal legal system. In fact, the requirement of the Indian Civil Rights Act that tribal courts offer due process in the Anglo-American sense could be said to offer to tribal courts and legislatures a concrete opportunity to rethink substantive law as practiced in the tribal courts to attune it to the substantive law that is held valid by the larger numbers of Navajo people. The replacement of lay advocates with attorneys, in this sense, would encumber this valid introduction into the judicial process of Navajo common law. Both judges and lay advocates are linguistically prepared to learn Navajo common law. They are also sufficiently familiar with formal law to see how the two might be formally integrated.

Missing from this equation of the potential law reform that might take place within the tribal court is a crucial element; can tribal judicial officials recognize that Navajo customary law can be validly termed law?

The Tribal Courts as the People See Them

The disparity between criminal and civil cases in statistics published, as Law and Order Courts became tribal courts, attests to the dominant view of tribal courts by Navajo people as places where criminal law and sanction and not private cases could be brought. The difference in criminal and civil cases, in terms of the remedies of jail and fine, or private relief to the injured party, define in a popular manner the distinction between the punitive white man's law known to the Navajo since Fort Sumner and the traditional law that satisfied before that time outside of white institutions.

If in the early years of the courts Navajos believed that private relief was obtainable within the Law and Order Courts and Tribal Courts they were rapidly dissuaded. Due to the faulty training of the tribal court staff, a familiar pattern was this: that the complainant had his complaint recharacternized by the clerk as a criminal rather than a civil offense. It is difficult to know from court statistics how many domestic disputes, are recharacterized as "disorderly conduct" by the court clerk. Many litigants have been surprised to find that their families suffer from fines or the jailing of a husband who is sorely needed at home as a direct result of the characterization of their complaint in the tribal court. Tribal judges, on occasion, have satisfied the parties, even when a criminal complaint was entered, by lecturing the defendant in terms of the Navajo behavior code to remind him "how one should act." Others, however, discouraged by their judicial advisors, who stress the need for a judge to act as a judge, particularly in relation to the financial difficulties of the court, have assessed a fine. At the heart of the injustices that occur in the process of Navajo legal institutions are not only the rigidity and anti-custom biases of the judges but also a misapprehension by the lay public of the processes and penalties that await a defendant or potential litigant.

Navajo people have come to realize that a report to the policeman or the filing of a paper in tribal court sets in motion the judicial process. Missing for Navajo people who are accustomed to dispute resolution in a personalistic and community-related process of conciliation and reconciliation is an understanding of the ways in which a person can direct his argument so as to get the law to work for him.

What the Navajo does understand is that to avoid the legal system is a good thing. Thus, Navajos who have filed either criminal or civil complaints feel little compunction about the private settlement of their differences, even when they have retained a lawyer or lay advocate. More severe are the consequences when a wife or relative files a criminal complaint that is channeled as a major crime to Federal Authorities.

In one said case, a Navajo man hit his wife in the face with a shovel while both were drunk. He was a heavy drinker and mentally unbalanced as a result of being a prisoner of war in Germany in World War II.

The wife was urged by hospital authorities to file a complaint in Tribal Court. She expected the judge to lecture her husband or to jail him for a week or so. Instead, the Navajo Bureau of Indian Affairs Law and Order Officer and the Federal Bureau of Investigation Agent determined that the case was one of aggrevated assault, one of the major crimes within the jurisdiction of the federal courts. The woman did not read or speak English. They prevailed upon her to sign a complaint in federal court and took her to Albuquerque where she testified before other Anglo people for reasons she did not understand. The second group of people was a grand jury. A young US attorney prosecuted her husband vigorously. The husband's court-appointed attorney in Albuquerque avoided prison for him by arranging his commitment to the mental hospital in Springfield, Missouri. This was no more than a device to avoid the inevitable sentencing to the Federal Penitentiary. No one at the Federal Mental Hospital spoke Navajo.

The wife was distraught by the results of her complaint. Her husband's veterans check, the family's sole source of income and credit could not be cashed by her. No one could haul water or wood to the hogan.

When the wife sought through a legal services attorney to make known her personal desire to drop the case, the FBI agent and U.S. attorney reacted with threats to prosecute the attorney for interfering with the processes of justice.

The FBI is proud of its high rate of arrest and conviction for crime on the Navajo Reservation. Yet their "success" has a high measure of human tragedy for the Navajo people who do not understand the possible consequences of their interaction with the legal system and who are appalled by results that they cannot control and never remotely foresaw.

THE FAILURE OF THE BIA TO INTRODUCE THE ADVERSARIAL SYSTEM IN THE ORIGINAL INDIAN COURTS

Mr. CREECH. Mr. McNickle, you have mentioned one of the problems which seems to be a keystone in the determination of the Indians' rights to the enjoyment of his constitutional rights in this country. Inasmuch as the Indian is a citizen and has the same constitutional rights as other citizens, how do you reconcile this position with the fact that in some areas the tribal courts and the courts established under the Indian Reorganization Act, oftentimes do not adhere to the full provisions of the Constitution of the United States? Specifically, I have in mind the situation which existed even in the courts of Indian offenses until May of this past year, where an Indian was not permitted to have legal counsel represent him in a criminal case, notwithstanding the provisions of the Sixth Amendment to the Constitution. He actually was precluded from having legal counsel by a regulation of the Department of the Interior.

Mr. McNICKLE. I would like to go back for a moment and explain the situation. When the Secretary issued the Law and Order Regulations in 1935, it was realized that the tribes would need time in which to accommodate themselves to a new order of social controls. It was hoped that as Indians acquired skill and experience in the use of a formal court system, they would modify it. In fact, they were asked at the outset to make any changes in the Secretary's regulations they thought desirable.

Some tribes did make some initial changes before they adopted the regulations as their tribal code. Inherent in this approach was the idea that if trained attorneys entered the tribal court, it would no longer be an Indian court, but it would get beyond the experience and ability of the Indians to deal with it. The situation would result in which an Indian who could afford counsel could outtalk and out-maneuver the court, because the court would not be skilled. The judges even now have not been trained in law, and in the beginning some judges had very little formal schooling of any kind. They had a sense of justice, perhaps, and that is what was supposed to operate.

The problem we now have is that the tribes haven't moved to make these adjustments. Perhaps the time is now here when the tribes could change their codes to permit counsel and introduce other reforms. The remedy is to work with the courts to get them to see this, not to abolish the court or condemn the court for being a faulty mechanism.[1]

Training for Judges by the BIA

The training of tribal judges by the Bureau of Indian Affairs did not help them get a very clear picture of the role of judges sitting in off-reservation courts.

Instead of showing him how to work along with the defense lawyer and prosecutor or policeman, the training taught him how to get the respect and control of the courtroom. He was told, for example, that he should not shake hands in greeting with acquaintances because people might think that he was in favor of friends or relatives. The BIA people also did not encourage the idea of a lawyer or lay advocate acting before the court and representing a defendant or a party in a civil action.

Again, the Bureau of Indian Affairs people were worried that the lawyer or advocate might challenge the power of the court.

In sum, the main lesson of the training sessions for Navajo judges was that they had to be impersonal and have all the authority in the courtroom. While it was true that the judge could not be personally involved with the disputants, it was not a very complete definition of the judge. When the judge must ask all of the questions for both the Navajo Tribe and the defendant and make the final decision of guilt or innocence, then he wears more hats than a judge who can sit back, listen to both sides and then pronounce his verdict, his official opinion about the case.

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[1] U.S. Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary. Hearings, Constitutional Rights of the American Indian. Part 3, 87th Cong., 2d Sess., June 1, 2, and 6, 1962. Statement of D'Arcy McNickle, American Indian Development, Inc. pp. 578-579.

After the Indian Civil Rights Act was passed in 1968, the Navajo courts had more and more representation on both the prosecution and the defense sides. The judges' role became more limited. But some judges even today feel uncomfortable in the courtroom with lawyers and lay advocates. This is not their fault. Their training was not very good preparation.

The Role of the Judge

The judge applies the law to the facts. He decides whether or not the person who has been complained against really did break a law of the Navajo Tribe. The judges of the Tribal Court are all Navajo people who must be especially learned in matters of Anglo law, Navajo law and Navajo custom. They are now appointed for life. This is because it is felt that elected judges would worry too much about getting elected and doing the "popular" thing. This is one opinion. It is true that many other state and local judges are elected. Sometimes it is a good thing for a judge to know that people can elect someone else if he doesn't try to do what the people want.

The judge is a person who has received his authority from the government. In the beginning he received it from the federal government and the law he applied was white man's law. In fact, he was often only a white man himself, an Indian agent.

When the Navajo people had a problem, they went to a wise man who told them how they should behave so as not to have the problem. He knew the people. He also knew the right way to behave. Because of this, his decision was usually correct.

The judge in the Anglo court who was copied when the Indian courts were organized is not supposed to know anything about the case. He is not supposed to have any personal interest in the case. He does not even have to know all of the law. Instead, he is a person who listens to the story and the arguments about the law of each side and then decides which argument is correct. The people who argue the law before the judge are called "lawyers." The judge may be a lawyer or one who is legally trained with a professional license to practice law but he does not act like a lawyer because the lawyer represents one side. BY MAKING VERY CLEAR THE FACTS ON HIS SIDE OF THE CASE, THE LAWYER DOES HIS JOB in the legal system. On the Navajo Reservation the lay advocates do this important job. These are young Navajo men and women who worked to learn the law from attorneys that they work with. They practice in the Tribal Courts.

What must a judge know to do his job?

He must know his own people and he must know the written and unwritten laws of the Tribe. He must also know what a judge can do and what a judge cannot do.

INTERVIEW WITH THE HONORABLE TOM B. BECENTI

Judge, Courts of the Navajo Tribe

LJ. This is an interview with the Honorable Judge Tom Becenti, Tribal Court Judge in Crownpoint, New Mexico. How many years have you been a judge?

JB. Eleven and a half years. From July the first, 1960.

LJ. How did you get this job over here?

JB. I first heard about it around 1959, when people were talking about it. They were saying that they would put in some new judges but that this time it would be by screening them. "And when we select these new judges, we want to give them this job and want them to do a good job because we have been criticized a lot from outside by what we call state courts." They were saying that the Tribal Courts were not doing a good job and the Tribal Judges also were not doing a good job. And in this way, the Navajos were being pressured [by the surrounding states]. Then the Navajo Tribal Council began to consider it; and because the Navajo Tribal Council said, "We will fix it in some way," that was what was the result. And when they made that decision, it came out in the papers, and people were talking about it, so I submitted a paper [application]. When this had all been put down on paper, it was decided that we would do away with the elective system and initiate an appointive system. "We will no longer have the constant changing which previously existed. We will have several judges, who will hold office for longer periods of time, considering their interests and the type of work that they do." This is what I understood as written in the paper. And I also understood that in the future the judges would also earn retirement benefits. Because of these things, I saw it as something worthwhile, and so I said that I would inquire about it.

And so I went to see the late John Perry, who at that time was Navajo Tribal Councilman from the Becenti community. He told me, "It is true that is what has been decided, but it is up to you what you want to do." And he said, "If you want to be cussed out by the old ladies, then you go ahead and apply." So that is what I did.

I submitted the paper. But then I did not know where to mail the paper. Paul Jones was the Navajo Tribal Council Chairman, and Scott Preston was the Vice Chairman at that time, and so I wrote up the papers in handwriting and gave the papers to Paul Jones. "This thing which is being discussed and talked about appears to me to be worthwhile, and I wish to try out for it. This is the reason why I am submitting my paper," and that was it. And then I just continued to hear more about it; and I just thought and wondered when I would find out more information.

And then, in the spring of 1960, in May or April (but I think it was April), I received some mail; and I was told that I had been called to appear. So that is how I went over there. There I saw quite a few others, and I guess that they had all come for this purpose. And this is how we got together in Window Rock. We were all interviewed, and that was it. And then in May a policeman brought me another paper, and I was told that I had been chosen and the only thing which remained was a final interview. And so we all went over there again, and we sat around for that whole day and half of the next day, and I was the last one. I went over there for two days, and then we were all interviewed again, by the Navajo Tribal Council; and there were seventy-four members, who were all there. And we had to appear before the Tribal Council and talk both in Navajo and in English. And this is what we did. And then we received word soon after that that we had been accepted. And then we were told that we would have to go for training, and this is what we did. We went to Tucson. And then we came back, and it was somewhere around July that we were called again. And then we were told that we would start work on July 1. So we all just grabbed our belongings and left our jobs. I was working at Gamerco. This is where I used to work. And that is the way it is to this day.

LJ. Before you became the judge, were you ever employed in any law enforcement, or did you ever work with the law?

JB. I never did any work connected with police, either with the Navajo police or the state, only with the military police in the Army during World War II, March the seventh, '42 until October 3, 1945. This is the time that I served with the military during World War II. That is the only time that that was part of my work.

LJ. Were you a policeman then?

JB. Yes, I was a policeman. At that time I spent only three months, and so many days, within the States. I spent three and a half years overseas and maybe two weeks. This is how I served.

LJ. This which we call the Navajo Tribal Court, I wonder when it came into existence, because before that it used to be called Courts of Indian Offenses. I wonder when the Courts of Indian Offenses first came into existence among the Navajos.

JB. As far as I remember, it was sometime around 1934, when the Wheeler-Howard Act was being discussed. In Navajo the Act is referred to as a Cross and a Circle.[1] Most of this is just what I heard. This is the way it was, from what my father told me. I think it started then. And that is when it was being discussed, but I don't think it was called Courts of Indian Offenses then. I do not know when they started calling it that. And at that time, the people who worked with the Courts of Indian Offenses were federal agents, like superintendents and principals.[2] And this is how they worked with the people. But the policemen were Navajos. The police were Navajos for a long time before then. At that time, the policemen did not dress like they do now. They wore their ordinary clothes. And they also provided their own transportation, such as horses. And this is the way it was at that time. And then, after that, Navajos were appointed, and this is when the 'anihwii' aahii[3] came into existence. And from what I know, there were quite a few Navajos that sat as judges in the Courts of Indian Offenses. And then, around July, 1960, when I said we started working, then they changed the title to Courts of the Navajo Tribe.

And this thing which we refer to as custom, and how the People worked with it, we never saw any of it. But those people who saw it and tell about it, and also we who have worked with the Navajo Tribal Courts, taking all this into consideration, we believe that it did exist, how the People worked with each other. And in instances where there was a mistake made, there was something to straighten out the matter, to clarify the situation, and something which would keep people as friends. There were these things, although they were not written anywhere. Perhaps this is what we talk about as being common sense. This is what they used to work with. And it seems to me that when a person was injured, there was no such thing as to punish the person who did the injury, and there was no such thing as jails. So it was mostly naalyeeh [restitution], such as tangible property, sheep, and cattle, but mostly horses, because then there were more horses, and also sheep, but there weren't so many cattle. You would find some here and there, and that was it. And most of this was naalyeeh. The people would say, "This wrong that you committed, this mistake that you made, this will be considered as naalyeeh. This is what you shall pay as restitution, or else you can compensate by doing some work." This is how the People used to work straightening out things. This is how they tell about it.

But there is this one other thing, which harms and does injury to people. And so they used to say that if there was no bee haz'aani, and if such things as jealousy and ill feelings become too much for a person, then the first thing is to do some injury to this other person out of jealousy. If the person is a good individual, maybe a good woman, then they might ruin these people by causing all kinds of scars on the face, maybe to the ears, or to the nose. They say that this is how they used to be. They used to bite off noses or cut up ears. This is what they used to do [as punishment]. They were branded in this way, and this is how people could tell them apart. When people saw another person with scars, they would think that that person had done something wrong, and that is the reason they had that scar. I understand that to be about the only [corporal] punishment there was,[4] although we never really saw anything like that. I guess that's what they used to do before that time when the federal government began watching over us more carefully. That's one way you can look at it. But they say that because of that, people were very careful with each other. They were very careful with each other, not to make a relatively large mistake. This is the way they tell about it.

Maybe it's also because of this same thing that there are these stories that these people that practiced witchcraft, or hurt people, became a big problem at one time, a long time ago. So they started planning to kill all these people, and said that this was the only way that they could begin to live peacefully again. So there were a lot that were killed. But there were also quite a lot that begged and said, "From now on we will not harm anybody any more. And we will not use this practice against each other any more." And they said, "We want this second chance," and these people really told everything about themselves. And they were told to really tell everything about themselves, not [relying on] any hearsay. They were asked, "Is it really like that?" This is what happened. In the past, people just heard about them. But we know about it, and it is true. We know that you do injure people with witchcraft and with the wearing of wolf skins, but it was because these people were injuring other people that they were also harmed. But a lot of them begged and set their practice aside, and these people that set this thing aside said, "It is really true. It is true that we can kill people." And they said that this thing called witchcraft and putting bad luck on people does exist. They separated themselves from stealing and all the rest. And ever since that time everybody again lived happily, and to this day this thing has never happened again.[5] But they again became suspicious of this over one another. Today, just like it happened long ago, the people use this on one another. I guess you can call it punishment or penalty, and that will not happen to them again today, because today we have picked up the Anglo law. We cannot do things that way any more. And the way we understand it is that we cannot do the same thing today when we harm another person. And that is what we call substantive law. If we do not see anything, we cannot do anything about it, because we're told that only those things that we witness can be used. This is how it has changed, "If you set this thing aside and if you never come back to it, if you do not use it on somebody again, if you do not harm anybody again, that is good, and that is what we want." And this is the way that the People used this method on each other. "If you do not keep your word, then there is something that can be used to harm you," just like saying, "You have another opportunity," just like giving a man another chance. This is also a sort of a serious thing. They're not joking about it. I guess it's like saying, "I want to straighten myself out, to be rehabilitated," but then there are some that do not really follow it. But in that case, there was no second chance. "If you do no do this, then that will be all for you." This is what it seems like it says. They say that this is the way they used to talk to each other. I guess it was because of this that people were more careful with one another.[6]

I want to go back a little further on this. But this matter of causing scars on one another happened long ago. They said that that should also be discontinued, and instead, it should be naalyeeh. "There shall be no longer causing injury to one another, and you should never again injure anybody, or else place scars on anybody again." So if a man makes a mistake, there should only be naalyeeh. This will straighten out the matter, and he should be told not to do it again, "and this is how they used to be careful with one another. And this is how they listened to one another. And they used to teach this to their children as soon as their children grew up. They placed on them these teachings. "It will be like this in the future. Do not do this. This causes embarrassment, and it is dangerous. That is not something that improves you. That is not something that will help enrich your way of life. It is the same way with witchcraft." It is said that they taught their children this long ago. As I said, these people set aside the injuring of other people, "So make sure, you who are young, do not meddle in this, because you kill each other with it. You shall never learn this." It is said that this is how it happened. I do not know how it revived, but today nobody says this. Now it is largely the Anglo teachings. That much I have to say about this at this point.[7]

LJ. When things like this were being discussed, who assumed the responsibility for arranging the meeting? Who brought the people together, and who used to say that restitution should be made, and the amount of the restitution?

JB. They said that there used to be naat'aanii, old men who sort of stood out among the People were the naat'aanii. They say that they used to be very strict, and so when something like that happened, it was told to them and they were the ones that sent out word and arranged to have the people come together. "At this place, we will be discussing this certain matter," and these weren't the only things. There were other things, like during the summer, if there was no rain, and when people started worrying, then these naat'aanii were notified and they talked about this, and sent word around, and the people prepared themselves for it with such things as food, but they say that meat was not scarce then.

And it was set up like a squaw dance and the people discussed it.[8] This is how it used to be. And then after that, when the 'anihwii'aahii came into existence,[9] from there on, every month, they would have these meetings. And they used to say the sixth day, or every month, and this is the way they used to do it, it is said.

And at these meetings people who caused troubles were talked about, and most of it had to do with stealing or rape.[10] This is what they used to do mostly. And these matters were brought first, and then, in later years they went to the court, after this was listed as one of the major crimes.[11] Those that involved our people, and also adultery, and also injuries which resulted from jealousy there were some of, but there were hardly any land problems. Land was not the subject of any discussion then. I guess then there was plenty of room, but now it seems like a lot of people are causing each other problems because of land.[12]

Then there was no liquor. But then there were some people who made moonshine. And there were also these games with hoops and wooden sticks which some people mixed with witchcraft. These were the main ones. And these meetings were held for these things every month. They say it used to be like this.

There was a man called Hastiin Ch'inliini who did some of this work. He used to say, when people were talking like this, or there was a man and a wife who were fighting, and such matters as adultery--it is said that he said this then, "Oh, so it's like that? I come from over there. And these things which you are talking about, I have done them all." This is what they say he used to say to them, "I know what you are talking about." This is what he used to talk to them about. I guess he used to talk about it as his teachings.

So this thing that you are asking about, these older men who were naat'aanii, who stood out among the people, they were the main ones who were the people's naat'aanii. Just like the way we put in naat'aani, but these naat'aanii only met way over there.[12] But those were ones who lived right there among the people and they worked on all the big problems of the community. Because it was given to them, and they used to plan. So this is the way they used to say dinebinant'a'i. It is called dine bi nahat'áo[14] [being a leader of men]. I guess this was the way they named them naat'aanii.

LJ. When people used to discuss things like this, when did this practice end? Was it around 1934 when you said the courts came into existence, or sometime before that?

JB. This thing that Washington placed called the Wheeler-Howard Act placed the courts. It seems like that is when it came into existence. But at that time, they only used to request the Indian Agent if there was one. He used to go among the people once in a while.. At that time there was only one at Fort Defiance. So he used to go up to Shiprock or Crownpoint or Tuba City or Chinle once in a while. After that some of the People started working at it themselves. Then there were Navajos, and they made this their work. So when they first planned this and the People started working with it, from there on.

There was no court like this. The People used to sit under the trees in the shade. This is where they discussed things. This is how people met and this is how the whole thing was started. So this building located here in Crownpoint where the Navajo policemen work was built in 1930. From the day it was built here in Crownpoint, then they started this thing they call "the month" because it was at that point at that time that people used to meet. So even when it was snowing like it is today, it was not too difficult for them because the meetings were held inside.

Before that time they used to have the meetings at the school that used to be here in Crownpoint, over there. There was an auditorium, and this is where the people used to meet. If there was a big meeting, that is where they used to have it. There was no chapter. The chapters did not used to have any buildings at that time. That was started sometime later. This is the way they did these things.

At that time, people who were judges and policemen used to meet in roundtable discussions. They used to hold these meetings like they were having a roundtable discussion. It was not like it is today where people go against one another.[15] At that time it was sort of a roundtable discussion. The people that were talked about used to sit in the middle. They were surrounded by people, and the people used to say, "This is what I know about him." I think this is the way it was.

LJ. Was the person who was being talked about present?

JB. Yes. He was there. I've seen some of them, after they built that thing over there. This is how the people were being talked about.

My grandmother had been chasing some horses, and somebody filed a paper. They said they were going, so we came along. I came with my uncle. We saw the people being talked about. There were no chairs, and that's the way it was before. People were just standing around. There was a judge, and there were some policemen sitting around. There were people all around, and in the middle was the person that was being talked about. He was sitting there. And the people told what had happened. When one was finished they would bring in another one.

This is the way I saw it, and this is the way I think is good for both parties; and my grandfather was one of them, and they asked him "What do you have to say?" And he said many things. Nobody said anything about witnesses. "And these men, they were the ones that were at fault. And we would like to hear what he has to say." I guess they just wanted some information from him. This is the way we understood it. And people used to tell about way back, the people say it was like this, and this is the way we were living. This is what the people say, and I think in terms of that.

LJ. So, then, at that time, it was the superintendent who took care of most of this work.

JB. That was before the courts that I'm talking about. It used to be the superintendent. That's what they say. They say ours was called Little Naat'aanii. I think his name was Mr. Stacher. This was his job. So when they did that, he arranged matters. So I guess it was because of that that people used to say "Let's go to where the naat'aanii sits." And the people's naat'aanii would notify each other, and they would all go over there. So everybody knew from these naat'aanii and from Naat'aanii Yazhi [Little Naat'aanii] that "in so many days, there is a meeting at the place where Naat'aanii Yazhi is," and naat'aanii who had authority would notify each other. And they would meet over there and witness the meeting. And because they were naat'aanii they used to also participate. But it was the Indian Agent who really ran the whole show.[16]

LJ. Did this Indian Agent ever place people in jail?

JB. That's what they say. But it was in Fort Defiance, so he used to take them over there. And when children were running away from school, they used to also work on that. And sometimes they used to go out into the community and hold meetings. I guess it was because of that that this lady called Kinnebahi, they say she used to always say--one was called Naat'aanii, one was called Naat'aanii Yazhi, and the other one was called Ahatata'ai [that which is put together, stick figure][17] --and she used to always say this certain thing whenever one of them arrived. (They used to have the meetings at White Horse Lake.) When they used to come over there, maybe only one of them would come over there. But when Kinnebahi came in, maybe only Ahatata'ai was there. In that case, she would say, "Ahatata'ai, where is Naat'aanii Yazhi?" But when Naat'aani Yazhi would come she would say, "Naat'aanii Yazhi, where is Ahatata'ai?"

And also, schools were already being discussed at that time, and Kinnebahi used to say to them, "All you say is 'school'. All you say is 'children'. Why don't you just eat up the kids? You're always saying 'children.'"[18]

So it was the Indian Agent who was working on this himself, and then also, the Navajos who were going to join him, and then it was after that that this really became the work of the Navajos. It was from these agents that these Navajos learned. They were Indian Agents, and they were called naat'aanishchiin. This is the way they tell about it. We heard about them and saw them, but because we were children, we did not see everything there was.

When I was in school, we studied some about the history of the local government, state government, and federal government, and I understood something about them, and it was because of this understanding that I felt I could do the work of a tribal judge, and also this is part of the reason why I became interested in it. I did not go into it without much thought. I had already thought about it as something good and worthwhile, and that is the reason why I decided to work for it. It was not for the purpose of making money or anything like that. I wanted to learn as much about it as possible, and with whatever I learned I could help my people. This is the way I thought about it. We did not learn very much, but it cannot be used all at one time. We can only use a little at a time. This is the way I found out it was. We have learned today that this is a court of general jurisdiction. This is where cases really have their beginnings. They call it a court of first general jurisdiction. I guess that is the reason why we are limited by the law and we're bound by the law's limit of court jurisdiction. This is the way it was here when I came here. That is how I entered judging.

LJ. Where did you go to school? Where did you begin school?

JB. I started school from here in Crownpoint. It was called boarding school. I went to school here and then I went to Fort Wingate. I started school at Fort Wingate in 1941. When I was going to school at Fort Wingate that is when World War II broke out, on December 7. So that is what happened on December 7, and these servicemen were leaving and they were being drafted. I guess at that time all they were doing was preparing themselves. I used to hear about this. Jeff King[19] was the last one to die [after World War II]. They were soldiers, and they went to fight among the Jicarilla Apaches. They were paid for that. I heard that they were being paid by Washington, so this gave me something to look forward to. I also wanted to be paid. So I sort of cheated. I was nineteen at the time, but I said I was twenty-one. They did not question me very much, and they said okay.

And then I went with others to Santa Fe and they told me "passed." But I was still undecided. I heard that most were backing out. So on March 7 of 1942 I went to El Paso for final induction, and I passed again. And from there on this became part of my duty. That is what happened. But then it did not go right. There were very many soldiers during World War II, so for some of them to be paid was impossible. This is what I found out.[20] So when I left the armed services I asked about all this, but they told me that there was no retirement or there was no pension either. Maybe that happened long ago but now there is none. There is none written out for you. So I just thought that I would return to school.

So when I returned in October it was kind of late because all the schools had already started again. So when I inquired at Wingate they told me that they were full. I went back to where I had left but they told me it was full. They told me that maybe they had room either in Albuquerque or Phoenix, and then I just sort of stuck around here, but then in December I went to Albuquerque. They told me it was okay and that they had room there but since the school year was already half way through, they said that I should wait until the following year. So I told them that if I was not taken elsewhere that it was okay with me.

And then I inquired down in Phoenix. They also told me that there was no room. So I just went back home and helped my father and mother during that winter. That was in '45 and '46. In '46 I left for Albuquerque. I had been going to school here but there was this interruption. I went back to Albuquerque for four more years and that is where I finished high school. That much of school I have picked up. From then on only small training sessions [held for judges] which still go on today.

It is the same with this legal education. I did not go to any college or university for it. Most of the time I use what is called common sense. And then, I never stop reading. That is what I do constantly. That is what takes up most of my time. I am still like that today. This is the way it is.

LJ. In the past when people held these meetings, did they also discuss separating a couple?

JB. Are you referring to custom?

LJ. Yes. Before the courts came into existence and the superintendents made this their work, did the naat'aanii ever discuss any of these problems?

JB. Yes, that is what we hear. When the people get together the people try to get them to make up. But if it is impossible and the person who says he wants to leave really stalls so it becomes impossible, then there was that route available to him. But he never just left like that. They would say, "If you bring this here for your children and this woman whom you cheated, [something for their use and support] if you also place this here for them, then you can leave." This is what they used to say to them. They say that some of them were able to do that, and when those were able, that is what happened.[21]

LJ. If the person was unable to do that, then did they say that he couldn't leave?

JB. I don't know how it was when those were the circumstances. I do not know about that. But according to what we are told, the parents of the son or the daughter, they used to help them out. But it is the parents of the boy who get on his side, and also the older men. They say, "He is our child, and he has this other opportunity to experience a better and fuller life. It is not good for him over here." These things happened according to what they said.

It was the same way with a woman. "Yes, let it be so, because he mistreats her, he is dying of jealousy, and he just goes after other women without thinking twice about it; and it is because of this," just like we talk about it today, it seems like it was the same then. But with us, we have to see it, but with them, a lot of it was helping one another.

This is what it mostly consisted of, a person saying "I do not like that woman" existed. Or else, someone saying "I do not like that man" was also there. And then the people around also said "We do not want this woman" and then, the other way around, the woman's relatives might say "We do not want him." That is the way that they started, and this is what happened in some cases. But between the two of them, the woman might say, "I like this other place better," and so they act sulky and refuse to talk the matter out, and because of this, sometimes the man will say, "I will just bring them [the two women] together. I want them both to be my wives, or else all three." They say this is how it went.

But for those who did not want this, it was possible for them to separate. "I will just move out of the way, and he can go with her." This is how it was. But some liked it. And I guess it was because of this that in some cases there were two, and in others, three [wives]. And even in some cases there were four.

And so it was because of a refusal to let one another go that they just brought them together. But those who didn't want to be with one another separated their property.[22] Today, when there is talk about separating two people, we talk about community property, if there is such.

LJ. In those days, if there was such a thing, did they used to separate property, or did the person who left go as he came?

JB. If it is the man who leaves, then they said, "Well, he thinks he's really something, so the sheep and horses that we have, we do not want him to take any. These belong to the children." This is the way it was, if there were some. Or else, "He thinks he's really something. Let him just leave it all. He will make a new life over there. It is up to him what he wants to put together over there." This is the way they used to settle these matters. Some used to do that. But I do not really know everything there is about that. I never really asked about it. But today it is like this. We talk about separating the community property.[23]

They say that that is the way they used to talk about it, but even then, the relative raised a fuss about it. A relative, the father, the mother, people who grew up with him or her, or an uncle, brother, or an aunt or grandfather. They are the ones that raise a fuss. They say, "No." They say, "That came from us." This was another method. They talked back about where the property came from. "The sheep, the horses, from whom did they come?" The way they talk about it, this was another controlling factor. At that time, land was not talked about, only this type of property. "That came from us." If it is something which the woman brought with her, if ever the woman and the husband separate, she will take it all. Because it is hers. It came from her. This is the way they see it. The man was just a servant. He was only there to help.

LJ. If it was the man that brought the property and he was the one to leave, would it also have been the same?

JB. I don't know how it was there, when the woman was the one that left, but it seems like it was mostly the men that were the ones to leave. The reason why I'm saying what I said is that men having two wives, because it was mostly the men that were leaving. They said, "Okay, since he thinks so highly of himself, this will be for the children." This is what they used to say. I guess that is the reason why it was said and it was told to them.

"If you are a weakling and incapable, then it will be your children suffering and doing these things themselves. You will just take off on a horse when it is only starting to snow." That is the reason why they invented that name ayeh needineyode [in-law chaser],[24] because he was a weakling and incapable, he left when it only began to snow. It was cold at home, and nobody had made any food to eat. When the sun came out he thought back and came back to his family, and he saw his wife grinding corn and she was having a hard time grinding for the children. It was then that he began to think differently. I guess it was in this manner that the name ayeheneedineyode was given.

That is the reason why in thinking about really leaving a woman and also having fonder thoughts of someone else, he thinks "Let me just take both of them. I will have both of them. Only in that way will I still have some authority over the property, and I can also continue to use it. I guess this is the way it is. For me to continue to be entitled, I must stay with this woman, and that one too."[25] It just seems like this is what they are saying. This is the way they tell about it. It was mostly men who left the property, and not so much the women.

LJ. Just recently, there was this man who was either General Counsel of the Navajo Tribe or worked for the Navajo Legal Aid Services. He wrote up a paper saying that there is no such thing as tort among the Navajos [traditionally], and in just thinking about it, it seems as if he was wrong. Because sometimes people harm each other or property is injured, and this is part of tort.

JB. Yes. When people hurt one another, instead of going to jail, there is instead a paying back or restitution.

LJ. That was in existence a long time.

JB. That was the only thing. Where could a person be put in jail? Where could he be detained? There was no place, so it was mostly a paying back. This was the only method of straightening things out. They say that this also happened with the federal government.

They talk about "he who killed the anasazi." Perhaps you have heard of it. He was a Navajo who killed an Anasazi near Chaco Canyon. Because of this, he lost some [of our] land. He had to give up part of the Reservation. I don't know if the Navajos know about this. Perhaps they do not tell about it. The boundary line ran from Farmington to near Bisti. He gave up a portion of this land to get out [of jail]. That is the reason why it ended somewhere near Waterflow. They say that he got out for that portion of the area that goes in. They say that it was a very important and great Navajo who killed an anasazi. They say that he was very important. That is the reason why my father says he probably wasn't great and important, like they say. If he was important and great, then he wouldn't have given up this land of the Navajos.

It wasn't a good thing that he did, that the Navajos lost a portion of their land. That is the reason my father says that. He knows about it. He says that is what happened. He is the one that talks about it like that. So the federal government did the same thing. Instead of punishing the person, it just became a tort, so the Navajos lost a portion of their land.[26]

LJ. A long time ago, when a person died and had some property, how was this handled? This thing called inheritance, when a person's estate was being handled.

JB. In that case, I think it was labeled as his personal property such as his clothing. The People were afraid of it. Everything that was very personal to him, that all went with him. And then, anything else, such as sheep, if he had these, it was the relatives, the mother, the father, sisters, brothers, and other relatives, who would divide it up. This is the way it used to be.

"This will be mine, in remembrance of him." They used to say that, and in this manner they would divide it up. They used to do the distribution in this way. If it existed, it was like that. If there was no property, then there was nothing. This is the way it seems to have been.

They used to be very careful with this in the past, like, if they were living with him in the home, and if the person died, then they would not live in there any more. They would move to another location. This was the reason why there was no permanent stable home. This is the way it was. There was plenty of land then. But now there is just a little, so now it is not practical. Who would build a good home like this and then just leave it? This is what they say. And then there was also no hospital, and they were far away. So, for this reason, when a man died in a home, then it became a hogan which was abandoned because someone died in it. They used to burn these. It was not used again in the future. This used to be the practice for some time, or else, they would bury the deceased in the hogan. Then they would not bother it again. It just sits there. It just becomes a home for it, and later, it just falls in. They say that that was the way it used to be. I guess that is the reason why at that time when a person became very very ill, before he expired, they used to take him out quite a ways from the home. Then there would be nothing wrong with the home, and then the medicine men who specialize in a certain type of ceremony would perform a ritual so that the home could be occupied again and used without harm.

And then there are certain properties, such as dah nídiilyééh [sacred family talisman bundles). Some medicine men had some things such as sacred corn pollen. These were not destroyed. There was a means of disposing of these things. There was a ceremony for it. It could be renewed and restored. And then it is given to someone who can carry it on. And this is the way it was handled. Some call it paraphernalia. This is the way they talk about it.

LJ. Also, jish [ceremonial paraphernalia].

JB. Yes, but there is this one thing, I don't know if it ever happened, this thing called jish, if there is nobody who knows about it and can use it, they say that it should not be given to anybody else again. Then it should be placed in some remote spot in some canyon up in the mountains where it will return to the Holy People, because nobody knows anything about how to use it. This is what they used to say about it. I don't know if this thing ever happened. This is just from what I hear. This is what they do with it. But if there is somebody that knows about it and can use it, then it is renewed and given to them. This person knows about it and can use it. It should be given to him. This is the way it used to be.

LJ. When something like this was being distributed, who used to assume most of the responsibility for it?

JB. I don't know about that.

LJ. Did people just used to get together for it?

JB. I guess it was like that. People just used to get together, but I do not know who assumed most of the responsibility. Just thinking about it, it was probably a relative. It seems like it was some of the elder men who said it should be like this, and this should go to this person. But sometimes I hear that the daughter-in-law was not really included. It seems like this is the way it was from what I hear. The reason why I'm thinking this way is that a long time ago, they used to say that. They were talking about a man who died, and they were blaming the wife. I guess it was the mother-in-law who was blaming her. I guess he was making a round wall of rocks, and he was injured from it, and it was because of this that he died. This is what they meant. "That accursed woman. All she was saying was 'a round wall of rocks' as if that was the only thing she could live in. Just because of that, my son was injured." This is what they say she said.

So in some cases where the man dies, it seems like they blame the wife. If it's the woman that dies, then it is the man that is blamed. It seems like it is this way. He or she is the one that did it. It seems like it is like this, and it is the basis of my thinking that way. So, because this person was longing for this round wall of rocks, there seems to be this blaming. Just when the daughter-in-law or son-in-law loses their partner, it is at this time that it seems like he or she is not appreciated. He or she is the cause of the grief.[27] This is the way I understood it. This is just the way I see it, but perhaps it used to be different. Maybe it was not all like that. This is the way it seems to be. But I do not know who does most of the work.

LJ. Before you became a judge, there was Watson Gibson and Sam Jim who were [popularly-elected Tribal] judges. They did not go on very many of these training programs. So did the men who were judges then used to have most of these hearings according to tribal custom? To me it seems that most of the hearings held in the tribal courts are handled more in accordance with the Anglo legal system. In those days, because they did not go to school and were not taught very much about the laws, did they apply more tribal customs and traditions in solving the disputes that came before the court?

JB. Yes, that was so. They say that that is what they used mostly. After that, we were given a jail and the Court of Indian Offenses. This was when we were given the Code of Federal Regulations. They were told that they should use the Code of Federal Regulations because it was a part of the system and that people should be placed in jail according to it. But before, when they were only exercising custom, they did not know how to use the Code of Federal Regulations. The way they tell about it, that used to be the work of the Indian Agent.[28]

In some matters things were given to the Indian Agent because these people could not take care of it. Even after they started using both, they still continued to apply more custom because they still did not know that much about the Code of Federal Regulations, and they were not instructed in it. The people really learned about it from Sam Jim and on.

Sometimes, when two people would get into a fight, it was impossible for either one of them to file a piece of paper [an action in court]. It was always somebody else's action, like a policeman. When that happened, he made out the paper, and said "He's the one that made the mistake, so just put your thumbprint on the paper" and in this way they went ahead and charged them with disorderly conduct. This was the main charge. It is the one that people really started working with first. Whenever there was something that did not seem right, it was always disorderly conduct.[29]

It was never defined like we have been using it today. This is the way it seems. This is the way I hear about it. From there on, after they really started working with it, then the white people and the superintendent of police really learned about it.

After these people were really informed about it, they found out that some were not disorderly conduct, that it was assault and battery.[30] This is the way that it changed like that. This is the way they were separated. And then Watson and others came, and they started working with the Code pretty good, but they still did not know exactly how to apply it, because there was a lack of training. And then there was no one who could really teach about the CFR [Code of Federal Regulations], only someone who could say, "When this happens, then this should be used." This is the way we came along and learned about it.

LJ. How did this word 'anihwii'aahii [judge] come into existence?

JB. I do not know when it began. I found out about it when Sam Jim was working as such. This was around 1930. This is when I said that this was made. This is when I saw him participating. And then there was one from Shiprock. He was wearing a bun. He was also taking part. I was just a little child then. They were saying that he was an 'anihwii'aahii. This is how I learned about it then. Before that, I do not know.

But the way they tell about it, before that time, I guess people used to come like that and there was this man who said, "This is the way people tell about it, and this is the way it is." I do not know what he was referring to. Maybe it was the late Hastiin Ch'inliini who said this is what he used to say, and imitate him. "This thing which you are now saying, I wonder if you will still be saying that at the end of the month and come here again." When I think about it, I just wonder what he meant. And then he also used to say, or another man said this, "This 'anihwii'aahii said that I could only be around [to live] for one more month. I do not think that is so. I will be around past that." This is what he used to tell about. In wondering about it, I just wonder how they used to make judgments or pass sentence. Perhaps he was actually saying "Take care of how you live for thirty days; and from there on you will be dealt with in another way."[31]

Perhaps this is what he meant when he said "You will be around only thirty days" but the way he used to tell about it, he used to say, "Even though you only gave me thirty days, I know that I will live many more days after that."

I really do not know how it was [that the word 'anihwii'aahii came to be]. This is only what I heard. I realized it only after Sam Jim. And then, ever since then, it has been like that. Even in English, I don't know. It used to be just "one who puts others in jail." Even though there was a lot of talk and discussion about it, we did not know until we studied about it and until we went to school. From there on, in high school we read about such things--central government, state government, local government. From this time on, then I began to understand some of it.

LJ. What about this word gooldi [court]?

JB. Gooldi. It was already being called that when I was born, and since that time, when people were being talked about, it was how I largely understood such matters as stealing and adultery. I thought it was only connected with these matters. This is the way we thought about it. We were only little children then. If someone said, "You are going to jail," the way it was thought about was that it was for adultery and connected with women. But after that, we learned that there were many other things that were connected with it. And then there is hweeldi [Fort Sumner]. They are almost the same. Hweeldi and gooldi. People moved back from hweeldi. That's what people used to say, and then they say gooldi.

LJ. I wonder if that came from that?

JB. Maybe it did come from there. I really do not know. Because they are almost the same, but I do not know. It's probably derived from that because people thought of it as jail. And over here when you are brought to jail, it's 'awaalya. It was probably named after that. Hweeldi and gooldi. Hweeldi probably means "like several people being in a hole." When you say gooldi, it probably means "being talked about" [court hearing]. And then, the people at that time did not know about it, but after we started asking about it, we heard that it came from the Spanish. They say it came from the Spanish because that is what they call it.

LJ. Yes, it seems so.

JB. It seems like it came from there. It is not a Navajo word. That is the way we understood it to be.

LJ. It seems like our Navajo Tribal Courts are becoming more and more like the Anglo courts. I wonder if this is good. We are going more in that direction and discussing more things according to that. I wonder if that is good, or should we do it more according to our own way of thinking, our own way of doing things? I wonder if it's better that we hold on to more of these things.

JB. It is better for us that we continue to include this custom law until the day all the Navajo people learn. At that time, I do not know how it should be. Because the way the Navajos think about each other, the way we think about each other, and the way the Pueblos think about each other are different. And then, the way the Anglos think about each other is also a different way. For that reason, for all of us to follow in that direction and set aside our customs, I do not think that it would be right. They should be included and continued to be used. Perhaps that is the better way, as some people think about it and say. Perhaps our way was better. This is the way they think about it. They think about it in the Anglo way to some extent, and they say that we like our way better. They began to feel that way after questioning the former Chief Justice, Murray Lincoln. This is the way they talk about it.

According to my way of thinking, I think it's better to have both. Today the way of the Anglo is good. The reason why I think that way is we have come to use and clothe ourselves mostly with what is made by the Anglo. These are things which belong to him. We have picked up some of these things today and are using them. Today, if our own bee haz'aanii became strong, that would be a good thing. It is like this within the Reservation today. Some of these big companies and corporations look onto the Navajo Reservation with a wish to come here, but it is not possible for them because of the law. These big businesses and manufacturers have operations where money totalling two million or nine million dollars is involved.

There are only small ones moving onto the reservation, such as Fairchild. They're big from the way we look at it, but perhaps to them it is small, or else General Dynamics. They cannot really become big due to our laws, because if they should ever become big like that, it's a big business with big money involved, and it is going to be a big problem, because some day, if it does not go right for them, they will be losing it. This is the way it will be. They will be losing a lot. This is what they are afraid of. If we had laws which were strong, then they would have the law there. If they will feel that they can protect their property, and the law will protect their investment--"if there is no law, and if that should ever happen, and they don't have any law that I can use, then there will be no available remedy. Therefore, I'll have to lose. I don't have a chance." This is the way it is.

For that reason, this is how I think about it for them. These are the ones that are big businesses. But the way they do it, these big businesses, other big areas like Chicago, Ohio, and New York, and around that area, are the main areas. These big manufacturers are located on land which is really expensive. Wherever they have businesses, this land is so high, but still they are willing to pay for it because they're big business. This is the way it seems to be. This is what they talk about mostly. But the thing is this. "If we ever deal with the Navajos, there must be something by which everything can be known."

LJ. Should those tribal customs which are known be included in the Navajo Tribal Code? Would this be good? If the Navajo Tribal Council, when it meets in Window Rock, would discuss these matters, and where it can be established, these customs would be written up and included in the Tribal Code and also used in determining hearings in the Tribal Courts, would this also be a good thing? Or is it a better way for someone who enters the Navajo Tribal Courts just to say, "This is custom" and prove it and have it heard and taken into consideration in determining the case?

JB. The way I think about it, if there was such, then it should be like the way juvenile matters are handled. They should not be sent to jail, but straightened out without it. This is tribal custom. If in the first instance, within the boundaries of our Reservation, it is not followed, and he did not do according to it, then the remedy of that tribal custom is already used, and we would go into the other field. I also think this is good. If they want it. Just like you are doing. This is a good idea. Don't ever lose your language any time in the future. Don't lose your identity. This is what they say. In this way, it is true we will not lose our identity.

Our way of planning, our way of doing things, these things should be tied to us and continue to be used on the side. If this is what they want, I do not think about it in any way. If this is used, some I think will want it. "I want that to be used first."32

"I want this relative of mine who has made a mistake to be lectured to." Those are customs. That is the way it is. If that is included, and if there is a separate judge for it, that would be a good thing. Then he would be working with that. Then if that is not filed, he can always say "I have given it to him [the regular court]". This would be a good way.33

LJ. But today, when things like that are being discussed, it is the chapter officers who assume most of this type of work.

JB. Or the Land Board, or Grazing Committee.

LJ. Or the Land Board or Grazing Committee. Such things as Community Action Committee, or sometimes it is the older men themselves.

JB. The older men. There are still many, yes.

LJ. Even today, this type of discussion still goes on. And even some of the people that come here do not want a person to be put in jail.

JB. That is the way it is, and these are all customs.

LJ. They want to have this person to be given a talk. Perhaps he will realize that this is the way to think about it.

JB. Yes, there are quite a few of them, which is good when they feel that way. If that does not work, then there is this other remedy available. Then if they wish to bring it straight to court, that would be all right, too. This would be up to them. They can either have the regular court, the custom court, or the regular court. I mean where the judge uses Anglo law. Or you might consider this the substantive law. This way would also be good.

LJ. There are several tribal court advocates like the prosecutor and Norman Ration, say they want to form a Navajo Bar Association, and they have been meeting for this purpose. Would this be a good idea if the tribal court advocates and judges would form this organization?

JB. If that happened, it would be a very good thing. In that way, if we formed a bar association, we would select a chairman, vice chairman, secretary and treasurer, and have the paying of dues. This money can be used perhaps to hold a meeting or a conference or even if we hold a weekly conference for all concerned DNA, Legal Aid, judges, prosecutors, policemen, clerks, and others, it would be held for all of them.

And because of it, we can also invite others from outside, from the state and federal, and then, because of it, it will be clear that we have some well-known organization, and also because of it, the people from the outside would be willing to utilize our services. They don't have to look around. They would have this list of tribal court advocates, and they could benefit. They could go ahead and write to them if they had any problems. Somebody would take care of their case or handle their case. This is the way it would be. This is what I mean. Where I said there were no laws, there would be some laws written. "I will give this matter to him, and he will work on it for me, instead of me doing it." This is what he would be saying. This is how that would be. There will be defense. There will be prosecutors. This would be the way it is, both in civil and criminal matters. It would be more in civil because civil is something that is more involved. And it's not actually concerned with punishing a person, because it includes such things as businesses and property. There should be available a court advocate that will handle that kind of matter for somebody. In that case they would be giving these to them. "I want him to take care of this for me."

But now, because there is none, we say, "It's up to you. Here." If there were some, then prople would know about them. You would have a list. "These are available court advocates." This is what we would be saying. There would be one for the defense and there would be one for the prosecution.

LJ. Sometimes licensed attorneys from the outside who have studied law come into the Tribal Court. Do you think they should be allowed to practice in the Navajo Tribal Courts?

JB. Right now, yes. Until we organize the Navajo Bar Association. After that we will have only members. If we allow these professional attorneys to be members in our association, if they are known lawyers of this organization, they can participate in our Tribal Court. This is the way it would be. But not others. Or else, if we said only Indians in this association, in that case, there are two things we could do. We can allow professional attorneys, or not allow professional attorneys, but we do not have one such organization established with a policy and regulations. We cannot say professional attorneys should not practice because this is the thing that matters. We cannot say professional attorneys cannot practice because of that [Indian] Civil Rights Act [of 1968]. If the person says "I want to be represented by a professional attorney at my own expense," he has every right. We cannot deny it.

But with the state, it's another thing. In another state they can't do that. The states, they have their own systems, the state bar associations, so an attorney from other places can't practice, unless they are members or are allowed to by the bar assocations. I think in the west there's an association, western division like that. There is another one like that, I think, New Mexico, Arizona, Colorado, Oklahoma or Utah,--I don't remember which one. These four have an organization; maybe there were more. I do not remember how many. And so these are members. And from this state they can go into another one. They can entertain a case in another state because they're a member of this joint organization. This is the way it is. But then, from another state, they can't do it. They will say, "We can't. We do not allow it. Let that guy bring the case to us." This is what they would say, under the organization. From what I hear, this is the way it is. I'm not too sure about it. This is just something I know a little bit. Just ask some attorney. He might know about it.[34]

Footnoted Commentaries on Interview with the Honorable Judge Tom B. Becenti

1

DV. The reason why the Wheeler-Howard Act is referred to as A Cross and A Circle by the Navajos is that when they voted for it, when the Act was presented to them for approval or disapproval, they could vote by symbol. If they were for it, they would vote with a circle, I believe, and against it, it was a cross.

2

SC. The principals mentioned, according to Dan Vicenti, are principals of community schools.

3

LJ. The word that is mentioned there is 'anihwii'aahii and it means one who passes sentences, passes judgment. Perhaps this was the time that that particular word was coined.

SC. To indicate judges?

LJ. Right.

SC. But prior to that, you did have Navajo people resolving disputes?

LJ. Yes, there were, but I'm not sure whether that word was also used for the headmen and other people who resolved these disputes.

SC. What do you think?

DV. I believe that the same term was not applied, because, in those times, it seems like they were more concerned with paying the person who was wronged, rather than stating any amount of time that a person was to spend in jail, which this word 'anihwii'aahi seems to imply. It means that so many days are set for a particular person by a particular person.

4

DV. When Judge Becenti was talking about persons scarring one another or marking one another--physical marks on persons who have done wrong--he was talking about what used to be done before the Navajos had contact with the federal government.

5

SC. Judge Becenti indicates that a person accused of being a witch in the old days was not summarily executed. He was allowed to come before the people and to admit that he had practiced in this way, and that he had this power, but that he was willing to apologize and set this practice aside, and, in essence, to reconcile himself with the correct way that a Navajo person should act. And if a person did show a truly apologetic attitude, apparently he was allowed to again become a member of the Navajo community; and he was not necessarily executed. From this, one can conclude that the execution of witches was reserved for those who would not show that they were willing to apologize and set aside these ways.

LJ. He also says that this has never happened again. What I think he means by that is that, although there still might be people who are around practicing witchcraft, other Navajos do not gather up these people and execute them, or else, force them to promise to forget and set aside this practice.

DV. From the context of what the Judge said about witchcraft, I get the impression that at one point in Navajo history the problem of witchcraft became so great that they actually had a mass trial and mass execution of witches; and I think this is what he means--that it has not happened again, that it became such a big problem that the people had to take an action that was very comprehensive, and that the aim of that attack on the problem caused by witchcraft was to try to eliminate all the witches. But it happened that certain witches asked for mercy and, on the basis of their confession and their promise that they would not use witchcraft to harm the people again,--they were freed. Say that there are still people around who practice witchcraft, and that it is even a problem today, but not the way it was at the time that they had mass trial and execution of the witches.

SC. At least one instance of witch execution was at a period of time when Manuelito accused a number of people of being witches. There is one interpretation which says that this was because these were leaders who refused to recognize the peace between the Navajos and the American government; and, in order to put these leaders out of the way, and do away with the rivalry, he labeled them as witches.

6

LJ. What I think he's saying there is that, when there was this mass trial and execution of these witches, there was no actual proof that these people were practicing witchcraft.

SC. Proof in the sense of evidence of people who could see.

LJ. Yes, you know, the way the court considers evidence today. So he's saying, today we don't do things like that. Today we have to see, and be an actual witness to something, before we can use it, and not just accuse someone of practicing witchcraft, perhaps just by hearsay. They may have cast a spell on you, or something like that.

SC. So it would seem that that would make it very hard to establish the link between an injury that someone suffers and a person who is supposedly practicing witchcraft, if you were to do this in Tribal Court, then.

LJ. Right.

DV. Unless you bring in people who would be definitely known by the Navajo community as diagnosticians. You have the seers, the hand-tremblers, and all the various people who are used by the Navajo people in finding out if a spell or a witchcraft action had been directed against them. I guess if these persons could cooperate as sort of technical witnesses, then it would be their story against the defendant's.

7

SC. Judge Becenti indicates here two important things. The first thing is that Navajo law was such that parents would teach it to their children. They not only taught people how to behave, but they also, according to Judge Becenti, taught them what to do if one person injured another. It also shows something very important--that Navajo people changed the way they saw problems, from using corporal punishment, in the sense of disfigurement of people--cutting off pieces of their nose or of their cheeks to mark the people for life--and substituted the practice of naalyeeh, or remuneration for injuries. So it shows that Navajo law was passed along, but it was not a static law. It actually was a changing law. It would seem that there was, at the very least, pressure from the whites to make this transition from the disfigurement of people who did wrong to the adoption of restitution as a means of resolving problems, especially compensating the victim of bad acts, according to Judge Becenti.

DV. In the translation of Judge Becenti's statements, Leonard used the term, "persons being careful with one another," to describe a type of relationship between persons. In Navajo, the term that he used was ałch'indasti', and, to me, there seems to be more there than just being careful. There seems to be some human controls type of thing--perhaps respect is implicated, in addition to just being plain careful.

LJ. Also, I think there's a sense of being afraid--perhaps not so much for injuring another person, but what might happen to the person who does the injuring.

8

SC. These naat'aanii that he's speaking of here are also described, by some writers, as being peace chiefs, because they not only resolved conflicts, interpersonal conflicts, but they also handled community problems, such as problems caused by drought.

LJ. Or headmen.

9

SC. Apparently, then, these second individuals, who were known as 'anihwii'aahii, were those local leaders who were specifically appointed by the white agents in the various agencies to handle dispute resolution at the local agency level.

10

DV. Perhaps Judge Becenti's statement regarding the most numerous kinds of wrongs, stealing and rape, might have something to do with the whites superimposing their ways upon the Navajos. In light of that, the observation that seems very logical is that there is a difference in the way sex is viewed and the way violations of these sexual rules are corrected. If the Navajos viewed sex as a property, and the property was taken away without proper payments made, I'm sure that that would be viewed as a problem by the Navajo people and that, when these kinds of matters are taken into court or taken to people who are supposed to be dispute resolvers, they are taken to these people as a civil matter, not a criminal one. But it is very easy to see that it is not understood in the same way by the white people who kept record of these incidents. This matter is really a civil concern of the relatives of the girl whose sex rights were deprived without proper compensation.

11

SC. Major crimes, meaning that rape was listed as one of the major crimes that were prosecuted in the federal courts, as opposed to the Tribal Courts. This resulted from the famous case, in re Crow, in which the courts held that an individual who had committed murder on the Crow Reservation could not be tried in the federal courts when, under tribal law, the crime of murder was seen in the customary light as being an appropriate remedy for the acts committed against the defendant. This created a sense of public outrage in the Congress, and resulted in the passage of the Major Crimes Act, which includes all crimes of violence, the latest being aggravated assault, which was added in 1968.

12

SC. The division of land into allotments on the Reservation, through the grazing permit system, has indeed created new definitions of individual ownership, sometimes definitions that are problematic because of the use of customary use areas to reinforce these definitions. Most of these cases are heard in the Land Boards or Grazing Committees, which are administrative organs of the Navajo Tribe.

13

DV. When Judge Becenti refers to the leaders of the past and the leaders of today, and that the leaders of today meet at a distant place, I believe that the meetings that what he's talking about is the Navajo Tribal Council that only meets at Window Rock; and they are leaders, but they're not meeting at the local level, with the local people, where their problems are, like they used to in the past.

14

LJ. The first word that Judge Becenti uses here is dinebinant'a'i.

SC. Meaning?

LJ. Leader of the People.

SC. The second word?

LJ. The second word that he uses is dine bi nahat'áo which I think, means you lead and work with the people.

15

SC. "Where people go against one another" indicates the adversarial system, where both parties lay out their stories and are allowed to cross-examine the other side.

LJ. As opposed to what?

SC. As opposed to a method which is more like a conciliatory method, where people get together and discuss things out, in an attempt to compromise their differences.

DV. He also mentions that, as opposed to the adversarial system, they did not rely on evidence. What they did was, they called those older people who were leaders and dispute resolvers and most of them knew the people personally; and they went there, not to give evidence as to what happened that caused the dispute, but, mainly, to talk about encouraging the resolution of whatever caused it. A lot of these older people go to these kinds of meetings. I think he mentions later that he went with his uncle to such a dispute resolution session.

16

SC. This indicates that, at a certain period in time, there was a definite relationship between the Indian agents and local leaders. While the Indian agent essentially led the court that was held at Crownpoint, in which he was engaged along with other leaders, and they talked about problems in the community, it probably was the case that, in the local communities, the Indian naat'aanii resolved conflicts that were not taken to Crownpoint. As Dan Vicenti mentions, some of the leaders, these local leaders, were authentic leaders; others were individuals who were appointed by the government and were not much more than mouthpieces of the government. To this day, some of the older leaders are thought of in a good light; and others are thought to have been no more than extensions of the white Indian agents. It's clear from Judge Becenti's discussion that the process that took place was composed of two components. The Navajo people tended to make the meeting run in terms of the facts that were brought out and the manner in which it was handled, and the way disputes were traditionally resolved in the local communities. On the other hand, it's also clear that the Indian agent used his power and influence to direct the decisions of the meeting in ways that fitted his own predilections and those of the government. This division might be viewed as this: the procedure for determining innocence or guilt, or whether an act was bad or not, was the

Navajo approach; but the sanction--that of jailing, for example--was a white remedy.

17

SC. He may have appeared very lanky or thin to this lady when he arrived.

LJ. Well, perhaps not only to this lady, but he was probably known by that name throughout the whole community.

DV. Most non-Navajo people who come into contact with the Navajos, either out of endearment or out of resentment, are given names.

18

SC. What she probably was saying, in a poetic fashion, was, why all this interest in taking our children away to the schools? Many Navajo parents were against the taking away of the children to schools in the old days.

19

LJ. Judge Becenti here talks about Jeff King. Jeff King was one of the last of the Indian scouts that used to accompany these U.S. Army Infantry that were dispatched to this area to help quiet down the Indians, or else, go in search of Indians who were out on raiding parties. He says that Jeff King, having been one of these Indian scouts--and I think he was a sergeant--was receiving a pension from the government up to the time he died. I guess he was the last one of the scouts.

20

LJ. What Judge Becenti is referring to right there is, he expected to be paid a regular pension upon his discharge from the army, at the conclusion of World War II.

SC. Because the Indian scouts had been paid that, right?

LJ. Then he says that there were just too many soldiers upon their discharge from the army after World War II, that it was too much for the government to pay each one a regular pension for the rest of their lives.

21

SC. Leonard has indicated that what he meant here was that, prior to being able to leave, they would see to it that he left something for them, to live on and use. One thing, though, I think that's an indication of the influence of the superintendent, because, in the general situation, the woman would be the one who owned all the property. And if the man left, he would only be able to take his personal belongings because, in fact, that was all that was his; and this requirement that the man leave some means of support for the wife reflects the division of property between an Anglo husband and wife more than it does a Navajo. So my guess is that in a lot of those areas the agency superintendent was already exerting some influence.

22

SC. The quotation of Judge Becenti regarding what the husband or wife or their relatives might say truly reflect the Navajo view of the situation, especially that which involves the flexibility of the wife, who actually owned the property. It also sets the notion of having more than one wife, or polygamy, into a Navajo context. Although white people tended to view this as some sort of exploitation of women, in fact, where women were the owners of the property, they were in a strong position, so that if they didn't like a situation, they were in a position to leave--or, rather, find another man; and they were definitely not the ones who were being exploited. Unfortunately, with the advent of the Indian agent as judge, the white prejudices about having more than one wife tended to prevail. And the white man's law began to be applied to treat having more than one wife as a crime.

LJ. I wanted to say, too, that in these cases the man didn't want to leave a wife; and, in order for him to continue to enjoy the property that they had, he would just, instead of leaving, bring in this other woman, he could continue to use the property.

23

DV. In the old days, and even among some of the present Navajo families where the kinship ties are still very strong, the matter of child support is not of paramount concern to relatives of couples that break apart or get a divorce, because, from the time a child is small, he or she is treated as a son or daughter. The child identifies with his maternal aunts or, in a lot of cases, paternal aunts, as being mothers; and the term aunt is [translated as] little mother. Maternal aunt is little mother; and it's oftentimes that the child just calls all of his maternal aunts his mother. And if the real mother is away for any reason at the hospital or someplace, they're just taken in by the maternal aunts or paternal aunts, who are already treating them as being their own, a member of their own nuclear family, so that particular system took care of the matter of child support. That is the reason why, it seems to me, that child support or paternity suits and things like that were never a Navajo practice, or of real concern to mothers before, as they seem to be now.

SC. Now, community property is a concept which is taken from state law, but specifically the state law of Arizona and New Mexico. Its origin is not in the Anglo-American system, but in the Spanish concept of property in marriage. The definition of community property is property that's created during the existence of the marital relationship. Is that a close enough definition?

LJ. Yes, excluding gifts which are received either by the husband or the wife, or else, property that's acquired by the wife while absent from the husband.

SC. Now, the property which the husband or the wife owned individually prior to the marriage would not be a part of the community property--is that right?

LJ. That is right.

SC. So, the question that the relative ask, in this tape, and, of course, in the traditional dispute process, and also in the Tribal Court, are still valid questions. In the case of sheep, the lambs, and the livestock, and the things that are produced during the marriage, out of, maybe, the herd that the wife brings--it's pretty clear that the relatives would still view these as being simply extensions of the property that the woman brought into the marriage, and not as community property to be divided evenly between the husband and wife. So it is a concept that perhaps remains foreign to Navajo notions of property ownership in the marriage. And as a matter of fact, it's a concept that's also foreign to most court systems in the United States that do not have any of this Hispanic legal tradition.

DV. The other thing that might be related here is that, first of all, the pastoral economy base is what, to a great extent, determined the life style and the culture of the Navajo people. And the way that the Navajo family adapted to the pastoral way of life, in this case, was that the woman, from the very start, controls much of the real estate. The reason that I mention that the woman automatically controls the real estate is because, in a marriage in the traditional Navajo family, the man leaves his family to move to the woman's home and land holdings; so, most of the time he usually just brings probably at the most his horse and saddle. So it can be pretty readily said that the woman is the one who is in a position to make the biggest input into what would turn out to be community property. So if there is a divorce, then, because the woman already has dominant control over the real estate and the sheep that are to be grazed on that land to provide the means of livelihood, there's nothing other than for the man just to leave, if he's going to be leaving his children.

24

DV. The term, ayeheneedineyode, used by the Judge, oftentimes is used, even today, by people in a teasing way, when they refer to the weather. In fact, the term could very well be used to describe weather; but there is a story behind it, and much of the story is implied in the judge's comment. Supposedly it happened a long time ago, when the man was put to a test, as far as his ability to support his family. What happened is that his family was in need and there were all kinds of problems going on.

SC. Leonard says the story has two meanings.

LJ. Yes, that's where the thing about in-law chaser comes in. The story is that there was this man and, as Dan started to say, he was put to a test. His family was in need at home and he was needed there. But then it started to snow--not really snow, you know--just the snow just began to fly. Maybe he got afraid, didn't want to live up to his responsibility; and he left the home and left his children there. There was no food, but he left anyway. And then, after he'd gotten so far from the home, the sun came out. So then he had second thoughts about what he had done, and turned around and went home. When he got home, he found that there was no food, and that his wife was trying to work, trying to grind some corn to feed the kids. Then, he thought about what he had done differently.

DV. People use it to express their optimism when everybody gets concerned about a big storm coming up, and they say, "Oh, it's just nothing but ayeheneedineyode," that is, it's not really going to be a big storm. It's just scaring you. In general, there's a lot of jokes about in-laws, anyway. Probably there are more jokes about a son-in-law in the Navajo culture than there are about mothers-in-law in the Anglo culture.

LJ. Who are these jokes made by?

SC. The father-in-law would make it about the son-in-law?

DV. Usually, one in-law says that about another in-law, because they say that there is an automatic rivalry between the in-laws. If there are daughters-in-law or sons-in-law, one son-in-law would say something about another son-in-law. The joke is that the people to whom these people are in-laws have a duty to protect their in-law. And the further joke, or the extreme of the joke, is that, if they keep saying it, the people who want to protect their in-laws start grabbing property if the teasing keeps on. If you have a watch on you, they'll just jump on you and take your watch away, because you're saying those things in a joking way, or else, "take your clothes off," they'll say.

SC. To grab everything you own to take care of it, but really just to take it.

DV. Yes. A lot of the times, they actually take things.

LJ. Or perhaps there are these two girls, and one of them's married. The other girl might tease the brother-in-law, or vice versa.

DV. The in-laws tease one another, trying to say derogatory remarks, or trying to down-grade them, saying, "I'm a better provider into that family than the other in-law, so in protection of the in-law that's the victim of that joke, the person whose brother or sister is the wife or husband of that person acts to protect the in-law that's being victimized by a joke. They want to take property. They say that for saying those things, we're going to take your watch away.

SC. They take it away from the one who's doing the teasing.

DV. Yes. They move onto that person and they grab him. Sometimes the guy who was teasing really begs to be released, like, especially if they're going to take your beads away, or something like that; and they ask for forgiveness, that they didn't mean what they had said about the other in-law. This type of joking goes on. It's a take-off from just the over-all treatment of in-laws, I guess. There are more jokes about brothers and sisters-in-law.

SC. Because the man in this story has a guy who was a bad in-law.

LJ. Right.

DV. Yes.

SC. A bad provider.

DV. Yes.

SC. Or not a provider you could trust, a fair-weather provider.

DV. A fair-weather in-law.

25

SC. The implication here is that the woman, not the man, owns the property; and the only way that the man can continue to enjoy and use it is if he stays with the woman.

LJ. Or, if he has any other woman in mind, he would much rather bring this other woman, and have them both, and be entitled to the use and enjoyment of the property.

26

SC. Judge Becenti tells the story of a leader who got himself out of trouble by giving up part of the Navajo land, which was in those days commonly owned, to make a settlement with the federal government. He analogizes this approach to the traditional way, in which individual Navajos gave up property that they owned personally and individually to remunerate a person who was injured. The analogy is fair, and very interesting, since Judge Becenti recognizes that the leader was in a position to pay remuneration with property which was not simply his own, but was commonly held; but, as he indicates, and as his father has indicated, a leader who would do this is really not a very good leader at all, and is not acting in the interest of all the Navajo people, to give up property that is not simply his, but was universally owned and used and enjoyed by the Navajo people.

27

SC. It might be that this projection of guilt on the part of the surviving spouse has something to do with the inner family tensions which surface when somebody dies; and the tension may center around the division of property. By blaming the surviving wife, the relatives are put in a stronger position, perhaps, in front of third parties, to make more substantial claims to the property that's left behind. That's just one possibility.

28

SC. Apparently a division, then, with the Indian agent applying white man's law, criminal law, and criminal penalties, and the naat'aanii, the Indians, applying Navajo custom, perhaps in the same hearing, or perhaps separately.

29

SC. It's probably pretty clear that disorderly conduct, as an Anglo criminal offense, could best fit the description of bad acts that Navajo people thought had to be treated by headmen, because it relates essentially to disruptive conduct, conduct that indicates that a person is out of step with the correct way that Navajo people should act, and, without getting into any specifically bad acts, just the general conduct and general attitude of the person to other people and the place that he lives.

30

SC. Assault and battery means that a person threatens and lays hands on another person.

31

SC. Judge Becenti was correct in his evaluation of what the guy was saying. This guy was saying that the court, and the power of the court, would be watching this guy, to see how he acted, for thirty days, so it would be rather like a suspended sentence, where a guy would be, not in jail, but, on the other hand, still subject to further action by the court; but I think it's probably right again to say that people who were told this in the early days really didn't understand it, because they didn't understand, maybe, how the court would keep its eye on them, or that a single individual had the right to keep an eye on them to see how they acted for a specific period of time. He just saw his conduct as relating to his entire life; that is, that he should act better--but of course he should act better until he died. That's just my interpretation of what Judge Becenti's trying to say.

DV. My interpretation of what he said there would be sort of a joke that he told about some of the people's understanding of what judges used to tell them in court. In that way, he joshingly said that the 'anihwii'aahii to a lot of Navajo defendants meant a predestinator, that in a way, the judges sounded like they were spiritually empowered to predetermine the people's lives--that I'm giving you only thirty more days to live--this type of a thing; and he told that in a joshing way. But through that joke seems to come the fact that, even the term, 'anihwii'aahii, is somewhat of a foreign term to the Navajo culture; that is, the idea to the Navajos seems to be that this matter of predestination to them is related to life expectancy. And when somebody tells you, I'm giving you only thirty more days to live, or when the judge says, I'm giving you a thirty day sentence, then the defendant, in a joking way, after he gets out of jail, says, the judge predestined that I would be alive only thirty days more; but I defy him. I'm going to live longer than thirty more days. And this seems to come out of his tale about it, because 'anihwii'aahii could be a sentence imposer, it could be a predestinator, it could be a predeterminer of a certain thing--a certain span of time, or whatever. And this point seems to come out of this.

SC. Do you think that it's correct to say, then, that there was a lack of comprehension of how one person could determine or control another person's life, in the sense of abridging his freedom, whether he was outside of jail or inside of jail; and that that really led to this confusion of how a person had a right to do that?

DV. I think so, yes.

SC. An authority figure. Because there was no precedent for that kind of figure in Navajo culture.

DV. I think so.

LJ. I concur with Dan.

32

LJ. A lot of these people that come into the Tribal Courts do not want the other person to be placed in jail, or even to pay. I think a lot of them just simply want to hear what the other person has to say or just to discuss a problem which may exist.

DV. Or to get the defendant to be lectured to.

LJ. And air out any hard feelings there are, and simply straighten out the problem.

33

SC. Judge Becenti's idea is very interesting. There would be a referee, or a conciliator, who would apply custom; but, if custom would not resolve the problem, then the case would be taken to the regular court, where the adversarial system and white man's law have a foothold. There are precedents for this arrangement in Ceylon. There, there are conciliation boards; and it's required that people take their problems to the conciliation boards that apply local village custom first. Only if the conciliation boards fail is the case taken to court. And the courts are basically courts in the English tradition.

34

SC. What Judge Becenti is indicating here is this: that every state has a state bar association, and to practice in the courts of that state, one must be licensed by that state bar association,or be allowed to practice on a motion of the court, in special cases. He is saying that until the Navajo Nation has its own professional organization for its lay advocates, it's not in a position to act as the states act, and exclude outside attorneys who are not licensed, but could be licensed by that Navajo bar association. When the day comes that a Navajo bar association is organized, however, there is a strong possibility that, unless an attorney is licensed by that bar association, he will not be able to enter the court simply because a Navajo defendant asked for an attorney. Rather, the attorney that will be appointed or selected will have to be licensed by the Navajo bar association on all but exceptional cases. And this will be an important step in seeing to it that attorneys or lay advocates who are trained not only in state law, but also in Navajo Tribal law and custom, are the ones who have access, ready access, and nearly exclusive access to the Navajo Tribal Courts.

INTERVIEW WITH PETERSON ZAH

On the Work of Lay Advocates

The program of Dinebeiina Nahiilna Be Agaditahe (DNA), the Navajo legal services agency, is now in its fourth year. The Navajo men and women who participate in it seek in their counselling and practice of law in tribal courts and administrative hearings to fulfill a need not even recognized in many legal services programs: to practice in a comparative legal context, one that relates legal representation to the special cultural milieu of their clients. Trained in Anglo-American substantive and procedural law by attorneys and their more experienced associates, they are in a unique position to tailor law and options available in the judicial system to the customary interpretations that color their clients' definitions of disputes and the ways to resolve them.

The DNA lay advocate is a member of an embryonic professional group that improves upon the skills of lawyers by adding to them a special understanding of dispute resolution and the implications of cultural values as held by the Navajo client. At every stage in representation, from the initial interview to the setting forth and explanation of options available to the client, his special cultural background improves upon the forensic skills of lawyers with differing cultural biases. His contribution is far greater than that of literal linguistic interpretation from English to Navajo and from Navajo to English. He is equipped to rework Anglo-American legal arguments that originated for Navajos when they regrouped after imprisonment at Fort Sumner to fit actual expectations and needs of people in their day-to-day affairs.

The interview that follows with Peterson Zah, a Navajo and one of the architects of the lay advocate program, took place at Window Rock, Arizona, in late January, 1972. Zah is a former teacher and a graduate in education of Arizona State University.

SC. Exactly how do Navajo employees come to be lay advocates for clients in the DNA organization? How does this come about?

PZ. I guess when the proposal was originally submitted to OEO there was a controversy about how many lawyers the Navajo people need on the Reservation. One group was saying that we ought to have fifty lawyers. Another group was saying that that fifty ought to be divided in half, so that each lawyer could have an interpreter. And so I guess, really, that the evolution of a paraprofessional and lay advocate system at DNA has derived from the fact that we originally got paraprofessional people as interpreters for lawyers. We felt that a lawyer is no good to us all by himself, and he needs someone to work with that can understand the Navajo culture, Navajo language, and Navajo problems.

SC. By interpreter, you seem to mean not simply a linguistic interpreter, but a person to make intelligible to the lawyers cultural ideas that are difficult for them to grasp, and a person who serves clients as interpreters of laws that are culturally foreign to them.

PZ. The way we feel is that when you come onto the Reservation you really sort of have to learn another system of law. Lawyers who have been going to school and practicing law elsewhere, off the Reservation, have a knowledge of a completely different system of law. So, when they come onto the Reservation, we like for them to recognize the fact that we have our own sense of justice, we have our own judicial department, we have our own courts. We felt that Navajo lay advocates could play a major role in developing that judicial system, that it wasn't up to the professional Anglo lawyers to do it.

LJ. When you first started hiring these interpreters, were there any intentions of having them represent others in the Tribal Courts, or were they to function primarily as interpreters?

PZ. I think that right from the beginning we felt that they would probably have to take some cases in Tribal Court. We also knew that we would have to train them to some degree. When we first opened our doors to clients, there were just so many people who came here wanting help that we never really had time to breathe.

We never really had the time to stand and think and have a brainstorming session on these things. As we went along we saw that the Navajo lay advocates could really play a major role in trying to develop the judicial system and in trying to develop the Tribe.

SC. How many lay advocates are we talking about?

PZ. Right now we have twenty-nine advocates.

SC. Are any of them licensed to be attorneys?

PZ. None of them are licensed to be attorneys.

SC. What sort of educational level do they have?

PZ. I think the majority of them have finished their high school. I know many of them have some college experience. I know several who have received their degrees in other fields, like in education. These guys are doing very well, and representing people in Tribal Court.

SC. And do you have in-service training? Is that how you develop them as practitioners?

PZ. I think that most of the things they know right now are picked up by experience, and from the fact that the client comes into the office and says he wants certain things done. Your first responsibility is to that client. You try to do everything you can do to help that client. I think that many of the counselors in the program, if they don't know the answer to any of these legal questions, they then utilize the lawyers working in that particular office to give them some assistance. So many of the things that they pick up are learned through participation, and through learning by doing. And we try to give them some kind of a formal training session at each agency level [branch office], so that the attorneys can give them some of the things that they know, some of the things that are being used on the outside. It gives them an idea of what the Anglo system of law is on the outside, and maybe they weigh that against the system that the Navajos use. The judgment is up to each individual advocate, with each individual client and case, as to how he's going to deal with a particular problem. We don't try to shove the Anglo system of law down their throats.

SC. It would seem, then, that the education period in the law offices would go over a number of years, three or four years. Is that right?

PZ. Yes, I think that that's the only approach to any of the problems that we have on the Reservation. We train the very same people who are affected by those institutions that control their lives every day. We need to control those institutions, and I think that the judicial system is only one of them.

SC. Suppose that tomorrow OEO were to give you an additional number of attorneys, equal to the number of lay advocates. Would you do away with the lay advocate system? Would you have the lay advocates become interpreters again? Or do you think they perform a function which is essentially different from the attorneys' function; or even that their performance of it is superior to that of the attorneys?

PZ. Well, I think that in many ways the counselors know more than a third-year law student coming in to the program. They know the system; they have been working here. You really can't trade off experience for anything. And so I think we have a pool of experienced advocates here; and we would like to hang on to them as much as possible, for as long as possible. And we want to give them some kind of formal training periodically so that they can go forth and exert some of their own intelligence and skills in Tribal Court.

SC. You know that many critics, law schools, and also, I think, the Columbia Journal of Law and Social Problems in an article have discussed the impact of the Indian Civil Rights Bill on tribal courts. They have suggested that probably the most negative feature of that was the introduction of attorneys into this court system. Do you think that the introduction of lay advocates in some way softens this particular criticism?

PZ. Yes, I think that on the Navajo Reservation, when we say "counsel," "lawyer" doesn't immediately come to mind. On this reservation, we tend to think of the counselors or lay advocates. So, I think where it talks about the right to counsel, it means the right to get an advocate.

SC. Do you look forward to the development of a Navajo common law?

PZ. I think that's a hard question to answer now, because it seems that the courts are heading in the same direction as the Anglo system of law right now; but I think that in some ways the courts ought to concentrate more on what the Navajo feels law is. This is because, to some degree, we were made as Navajos to accept and live by what is in the Tribal Code, which is mainly a white, BIA-oriented code. I really don't know if that's what the Navajos want. To me, the way that I interpret law, law is something that the society wants as a whole. Law is something that governs the actions of each individual within that society. Now we have a Tribal Code here which was promulgated by the BIA [Bureau of Indian Affairs], so that it is sort of a superimposed element. In many ways we are made to live by these rules, so I don't know if it really is law. So, the law that the Navajo thinks ought to exist on the Reservation might not really exist on the Reservation. I think that the Tribal Courts, to some extent, ought to head in that direction. Of course, the excuse that the Tribal Courts give is, "we only interpret laws which are passed by the Tribal Council." So, maybe more concentration ought to be made on the Tribal Council as far as getting certain laws enacted, because the only thing the Tribal Courts do is interpret the legislation that the Tribal Council passes.

SC. Well, you certainly are aware that the Tribal Code says that where the law is not written down, and where Federal law is not involved, custom will have priority over state common law. Do you think that this is followed in Tribal Court today? For example, in cases of injury to persons or property, where judges are applying law that isn't written down, and have a choice of Anglo-American common law and historical Navajo notions of restitution and compensation, what do you think leads the courts to apply one rule or another?

PZ. Well, you know, I think that all of us are aware of the part custom and usage play in the Tribal Code, but I don't really see it being used that much, because the judges come right back and say, "What Navajo 'law'? It's not written down; it's not codified by the Council." So, sometimes we try to bring out the Navajo custom and usage provision in the Tribal Code and try to capitalize on it, but if the judges don't use that and disagree with you, then it's pretty hard to use those provisions. I think probate cases serve as a good example here. The Navajo custom on probate is that when someone passes away, he is buried; and then, four days later, all his belongings are distributed among the immediate family. Usually the family or one of the children who is the oldest is sort of given the authority to distribute some of the belongings that were left behind to the other sisters and brothers, or to anybody else who might have a claim to those things. Okay, to me, that's the Navajo common law.

Then, on the other hand, what are we doing with these probate cases in Tribal Court, after several months have gone by? I think the lay advocates ought to encourage more of these dispositions of property on the fourth day; record these things and just file the record with the Tribal Court, saying that this is what the whole family decided, this is what they felt was just for everyone. This should be done, rather than fight about it, using Anglo laws and probate laws in the Tribal Courts.

I think tribal leaders ought to concentrate on strengthening the role of custom, because the way I look at the tribal judicial system is this: if you have a mean dog that you keep to look after you, that dog is no good if he doesn't have any teeth. A judicial system is the same way. If somebody breaks the laws within a certain society, then you have the judicial system to punish them. You have the judicial system to go after them.

I think this brings out another point. The Anglo judicial system seems to operate on the idea that if somebody breaks laws you go to court and then you give him a fair hearing. At the end of that fair hearing, he's either guilty or not guilty. There's no in-between. And if a guy is guilty, then you place a guilty conscience on that person, so that, in many ways, he then becomes mentally disturbed. The society sort of isolates him and ostracizes him, so that the end result is that because a person has gone against a certain society and is guilty of certain things, he is made to suffer mentally, because of the system.

SC. Do you mean to say that that's not the Navajo way?

PZ. If we're talking about Navajo common law, things would probably be handled another way. Sure, the guy might be guilty, but he's still a human being. People would still take a human interest in him. His clan members, his relatives, are not going to ostracize him and say, "You're a bad man because you were proven guilty." They'll take another approach, and that approach would be, "He's still a member of this society, still a member of this clan; and he needs our help." They would go talk to the head of the clan, go talk to the chief, and see that everybody counsels him. He is not put away for good, simply because he's guilty. He's being counseled in another way. He might be guilty, but whatever penalty is applied is completely different from the Anglo way. When you think about these two ways of doing things, you often wonder where Navajos ought to go. Do we need to head in the same direction that the Anglo system is heading? Do we need to make people "guilty" and have all these other problems as a result?

SC. The Bureau of Indian Affairs, when they were against the amendment to Public Law 280, said that they didn't feel the Tribe had to give its consent before a state assumed jurisdiction. Their argument was that they had been pushing for years for a uniformity of laws, and that laws governing behavior on a reservation shouldn't be any different from those outside, and that an Indian on the reservation should learn to adapt to the law that he might face when he leaves. Of course, you recognize right away that these ideas fit within a general program and idea that the Indian *should* leave the reservation, *should* go to the city, *should* join the mainstream of American life, and so forth. I gather that what you're saying, then, is that, from a standpoint of law, cultural pluralism really can exist.

PZ. I think that we're entitled to pluralism, as much as anyone else is. We're just like anybody else. The whites are divided on many issues, on many things. The blacks are divided on many things. So are the Indians. And so they are utilizing their right to be pluralistic just as much as anybody else. I think that that's one thing that the public has to be aware of. I think you really cannot have one law which will affect every tribe. You cannot have one solution to a problem, and then try to apply that to every tribe in the United States.

LJ. Let's explore the evolution of law on the Reservation, to see if Navajo lay advocates relate to it. Back in 1864, when the Navajo Tribe was at Bosque Redondo, the system of appointing headmen came into existence. This system continued to exist after we came back to this reservation. Then, later on, the headmen took on a more important role. They became judges, in a sense, because a lot of the disputes and problems that arose between Navajos were tried before these people and thus resolved. Headmen no longer exist, but I think a lot of the roles that they played and functions that they performed have been assumed by other people, such as the chapter officers and councilmen. To what extent would you recommend that this system be strengthened or allowed to assume a greater role in dispute resolution among Navajos?

PZ. Well, the headmen, the people who were chosen back in those days, were the heads of clans. They had a lot of respect from their own peers. They had a lot of respect from their own people and relatives. I think that as time has passed this respect has been transferred onto other people and other groups; and, as a result, we have the chapter system, we have judges, we have other people within the Tribe. Right now when Navajos are in trouble they turn to these people. I think that what the Tribe and the Navajo people ought to do is to be able to give these people a stronger voice and a lot more sayso as to how the Tribe ought to function. If there are disputes among individuals, I think the people involved ought to first go to some of these people, and these people ought to listen. Let the head clansmen and chapter officers try to resolve some of these problems at the local level before resorting to the Tribal Courts. I think this is the role that the headmen played in times past. When somebody was in trouble or when somebody was in the wrong, they didn't head straight to the courts. They went to somebody they respected in the community, and he tried to be a peacemaker. I would like to see more of this than we have now.

LJ. I know that a lot of the problems that exist among families are still decided in this manner. Would you say that there's a series of steps that a couple or family might take in resolving a dispute rather than go to the Tribal Court?

PZ. Well, I don't specifically know what those steps ought to be, but I believe that people should go to somebody that they respect in the community. I would probably say that the people themselves should try to resolve among themselves the matters in dispute. Then, if they cannot, they should go to someone within the community for whom they have a lot of respect. I think that for Navajo people to solve their problems in this fashion is more meaningful than to have a judge who is sitting hundreds of miles away say, "I know the law, and you are right and he is wrong." I think this all goes back to the system that says somebody's either wrong or right; and who's to say who is going to be right or wrong? But if you try to solve some of these problems at the local level among the people who are in dispute and the people who might be affected by these disputes, then no one is really right and no one is really wrong. In that case people might think to themselves that one of them is wrong, but they don't come out and say, "You are dead wrong, and you ought to be punished for it." They look at that person as another human being, thinking that it is very unfortunate that he is in this situation and needs help. So, the fact that the guy might be wrong indicates to me and indicates to other Navajos that the only reason why he's there is because he needs our help. And we'd better help him; he'd better get that help immediately, from someone in the community. I would much rather have people solve their problems and look at their problems that way than go to court, where they're going to be told they're either right or wrong.

LJ. As part of our legal education course at Ramah, we are going to try to prepare a legal dictionary. How would you describe or define the Navajo term "*bee haz' aanii*" [formal Anglo law]? How did this term come into existence? Did it come into existence with the formation of the Law and Order Code or Tribal Court about 1940, or do you think it was in existence prior to that time?

PZ. I think the word has a lot to do with this law enforcement thing, because I think that one of the things the BIA pushed was law and order onto the Indian societies. I think that the term *bee haz'aanii* probably came from that, and really means "this is it" or "this is the law." I think Navajos didn't really push it. My great-great-grandfather probably wouldn't know what that word means, because I don't think it really did exist back in those days. I think they probably used another word instead, a word which had more religious significance.

LJ. Do you think that word might have been *dinebinehat'a* [the law of the People]?

PZ. Yes; I think that *bee haz'aanii* is a recent word. It must have come about within the last twenty or thirty years.

SC. You know that many of the law enforcement workers in the old days were used against Navajo culture; they were used against plural marriage, for example, and against the medicine men. Do you think that's the reason why *bee haz'aanii* almost seems to connote an opposition to religious belief in the minds of individuals?

PZ. I think so. As I said, I think that that word came about very recently. I think that the word used before that really meant something completely different. It had a lot of religious belief in it; it had a lot of religious significance. I think that *bee haz'aanii* came about very differently. I would venture it was probably pushed very strongly by the Bureau and the law enforcement people who worked for it.

SC. Do you think, then, it would make this idea of "law" more difficult to explain to Navajo people? Do you think it's hard to explain that "law," this *bee haz'aanii*, can be used to support custom and to support religious tradition, when historically the law was used against religious tradition? Would that create any problems?

PZ. I think it does create some problems, because it just doesn't jive with the old traditional life. Since law enforcement was used to try to do away with all these religious beliefs, whatever they were, then I say that it is very hard to work in a legal context using a word that has always been connected with these practices.

LJ. How would you explain "Navajo custom"?

PZ. I guess that Navajo custom is the behavior of Navajo individuals, our daily lives. From the time the sun comes up, we do certain things, in certain ways.

SC. Can you give me a specific example of Navajo traditional law upon which lay advocates might draw?

PZ. Well, I had a probate case, and here's what happened. I went to a meeting of the family involved, after the burial. The people were very, very, very sincere. They meant what they said; and they said to one person, "You're the oldest in the family. Our mother has died, and you're the oldest one. We'll trust you with the grazing permit. We'll trust you with the cattle and the sheep and the money and the house and the field and the fence, and with everything that she had. You distribute these things among us; and whatever decision you make, and whatever you give us, it's okay with us."

SC. That's precisely the way distribution of property has been recorded as far back as 1890.

PZ. Right. I was watching this man. He knew that there were three sisters and four brothers. The old lady used to really weave. These weaving materials of hers couldn't very well be given to one of the men; and of the three ladies, one of them could really weave. She could really make rugs. So, all these materials were given to the one who could utilize them. I think we need to practice more of that. That's Navajo common law. All we need to do is file a decision like that with the Tribal Court, to give it official recognition.

SC. How can the Navajo lay advocate here in the DNA program help bring these two systems together--for example, probate as an informal system that people recognize, and probate as a courthouse system? And what can the lay advocate do where the two systems of law inherently differ? Here, I'm speaking, say, of the idea of negligence, where the Anglo system recognizes varying degrees of negligence with varying amounts of compensation, while the Navajo system does not. What can the lay advocate do?

PZ. I'd like to see more lay advocates being used by legal services programs, where they'll really serve the function of putting the two systems together. The way I look at the two systems is that you can't help but come up with something better than both of them, using the best elements of each. If there are two conflicting views, and you have the insight into both of them, the third thing you come up with is bound to be better, because it takes the best from the two. I'd like to see tribal court advocates anywhere, whether it's on this reservation or on other reservations, be able to somehow make judgments as far as the quality of legal systems, and be able to fuse them together, so that we come out with something that is better than what we see on the outside, and perhaps better than what we see on the inside. It's not an either/or type of situation. You don't either have to be this, or have to be that. I think you can mix the two systems together and come out with a better quality legal system. And I think that's the role that the tribal court advocates ought to play.

SC. Well, then, you've developed at DNA a person who's unique as a paraprofessional, because I know of no other program where the paraprofessional as a lay person is actively engaged in advocacy, with the expectation that one of his main functions is to mesh tribal culture with Anglo-American law and procedure. Suppose there is a situation such as the one here on the Navajo reservation where, when the DNA organization was formed, there were no Navajo lawyers. Now you do have one Navajo lawyer, who obviously can't meet the needs of all the people. In legal programs serving minority groups in other places, where there are no minority-group lawyers available, do you think that paralegals would serve a purpose in the interim?

PZ. I think that there's no way out except to do that. As I said before, I think an Anglo lawyer doesn't know the customs and the people when he goes into one of these communities, and he is foreign to all the problems there. An immediate solution to this is to train and utilize community paraprofessionals. This is what DNA did. Maybe twenty years from now DNA will not have any tribal court advocates. Navajo-speaking Navajos will become lawyers. We might have fifty professional lawyers to serve the same functions as tribal court advocates do right now. I think all these programs need to utilize more and more paraprofessional people from the communities they are supposed to be serving, and they should bring them into the system.

Here is another reason why I think people ought to use paraprofessionals. In the early days of the legal services movement, the lawyers went out into the field and were always crying that they wanted to do more law reform work. They said they were tired of the tedious daily casework, such as divorces and paternity suits;

they wanted to take on more challenging cases than that. All these little cases took all their time so that they couldn't really put a dent into the law. I think that what they were really missing was paraprofessional people.

We Navajo people said that we wanted Navajo lay advocates. We sort of told the attorneys, "Hey, why don't we handle all of those cases where the Tribe has jurisdiction, the so-called 'little' cases?" This relieved the lawyers to concentrate on bigger cases. We'd like to see all the attorneys in this program work in state courts and in federal district courts. And where lay advocates need advice or need the interpretation of certain laws, then they turn to the lawyers, and they give what the advocates ask for. And so I think that's another function that lay advocates could serve; that is, to relieve the attorneys so that they can do other important things, in state court and in federal district court. That's one more reason why I'd like to see more paraprofessional people.

SC. From your discussion of custom, I can see that proving in Tribal Court that certain customs exist can be very difficult. You mentioned the division of property at death, probate proceedings; and apparently that is general enough so that you could say without any qualification that it is still a part of Navajo custom as it's practiced today. Is there some standard that you would apply, if you were an attorney and wanted to argue that something is Navajo custom and, as such, superior to state law, or that something isn't Navajo custom? What's your view on this?

PZ. I don't have any standards. I wish there were some. If there were, then we wouldn't be going through this whole process. We'd have the answers to our judicial questions. I would say that a lot has to do with the client you represent. If your client is a traditional Navajo, by anyone's definition, then I would say in a probate case that those customs or traditional habits which he lives by ought to be applied. If you're representing a client who went to Harvard or UCLA and came back to the Reservation, he probably would disagree with Navajo custom. You have to consider who your client is, and what he thinks is just and right. He might be a Navajo who doesn't know how to speak Navajo. So you would have to look at him, and maybe you would say that the Anglo concept of probate would apply here. You can see that it's very hard to define custom without bringing in time, because with these two individual examples, time has a lot to do with what you apply.

SC. Then, apparently, one of your standards would be that the custom must relate to the life style and beliefs of your client. What would happen in a case where you're representing a client and it would be to his advantage, even if he believes in custom, to apply Anglo-American common law? Let's take a case where the client is a defendant in a tort action, and under traditional rules he feels that he should make a payment to the other person. He doesn't understand anything about negligence, but you say that if you apply the standard of contributory negligence you can prove to the judge that the other man was contributorily negligent, and that would act as a bar to your client's having to pay anything What would you do in a situation like this?

PZ. I think that that's a very hard question to answer generally, without really having a particular client right in front of me. I think that you have to keep your client in mind when you are making a decision as to the kind of theory you are going to apply in a case. But I don't like the notion that some advocate might say, "I don't care about law reform or judicial reform or trying to reform the legal system. I'm just here to protect my client." I think that's going into a dead end. We've got to keep in mind that we're working within a system which is huge, and we must determine for ourselves where this whole system is going to go. In what direction should we be pushing? This way, or that way? It's a very hard question, and it's one that we all must face.

You know, the Supreme Court is going to go through a tremendous change right now, and every lawyer is going to have to think twice about bringing the same type of case now that he wouldn't have given a thought to bringing ten years ago. It's all because of the change in judges. I think that in Tribal Court you face the same situation with the so-called Navajo laws and the Anglo laws. I think it's very hard to answer some of these things generally. You must take your clients into consideration, but you can't only do that and be satisfied. We've got to consider where we want our judicial system to go. I think that in your example the advocate must consider, as a Navajo tribal court advocate in a judicial system which works within a certain government, where he wants to head personally. Also, he must look at his client and discuss the whole thing with him. The client might help him make the decision on where they ought to go in the case. I think we must look at and be accountable to our client. Our client represents the community.

SC. It would seem, then, that the advocate must be a person who is knowledgeable about all the possible options. He sets forth these options and lets his client make the choice.

PZ. I think this is a specific reason why I would hate to see a lot of Anglo lawyers practice law in Tribal Court. They might take the view that "this is my client; and my job is to protect him, and my job is to get what he wants," completely ignoring that we are trying to build a judicial system that will jive with what the local people think. And so that's why we should use paraprofessional people here in Tribal Court, because they are able to weigh all angles and all possibilities and then make their decisions. A lawyer would probably focus on one issue and take that up. In the process of doing that he might destroy the whole judicial system. You really don't know. Advocates are the only ones who can understand.

LJ. We envision the establishment of a law school somewhere on the Reservation, perhaps at Navajo Community College. How much emphasis do you think should be placed on the teaching of tradition and custom, so far as it can be documented?

PZ. I think that a prerequisite would be to codify the common Navajo beliefs, and to codify Navajo common law. Someone has to write all this down. Then we would be able to go to an institution like Navajo Community College and teach these things. Right now, we're fluctuating back and forth, going to the Anglo law and going back to the Navajo law, depending on who we represent, and who is in on the case. I think that if we continue to do this, we might not be strengthening the Tribal Court. We have to decide for ourselves. We Navajos, what is it we want? What laws ought to apply to us? We've got to make these basic decisions before we can teach this sort of thing. If we were to go to an institution right now and start teaching custom, I wouldn't know what to teach.

What is custom? You know, somebody has to define those things.

SC. The project at Ramah is developing some textual materials on what today constitutes Navajo custom and law. The idea would be that paralegals would go to the high schools and teach customary and formal law as comparative law, not saying that one or the other is right, but, rather, making the high school student aware of Navajo legal tradition and Anglo-American law, both of which have influence on his life. Could you envision lay advocates going into the high schools and teaching a comparative law course in Navajo and English?

PZ. Yes; I think that would be very helpful. I think that if we're going to solve problems on the Reservation, we're going to have to start with the youth. This means starting from the elementary school and working right on up to Navajo Community College, plus going out into the chapter system and the communities, talking with small groups here and there. People on the Reservation must be able to distinguish between the Navajo system and the Anglo system of law. The Tribal Courts ought to be pushed to do some of the things that Navajo people think are just, what they think is right. I would also like to make a point that within the legal services program there is always the question of the accountability of lawyers. To whom are lawyers accountable? Are they accountable to their client communities? Are they accountable to themselves?

SC. Why is this? Why is there this particular problem concerning legal services programs?

PZ. Well, as I listen to lawyers working with Indian people, they always raise these questions. It disturbs me to find that lawyers in many ways think they're accountable to themselves. They can make the legal judgment in specific cases. They can choose cases. And, they only have a tendency to take just those cases which will give them a lot of publicity, which will give them a challenge in their work, so that they can put something into the law of their own. They take these ego trips.

SC. Ego gratification.

PZ. Right. I think that one way to eliminate that is to have something like we've got right here at DNA. We have Navajos who are democratically elected by their chapters to serve on the DNA board of directors. They are democratically elected, and they're the guys directing this program; we're only representing their wishes. We have to go out and try to solve the problems and bring the cases they think we ought to. We file cases they think we should file.

SC. Which are more important cases, the big cases or the little cases?

PZ. As I listen to lawyers, I begin to think more and more that they believe they can make legal judgments among themselves without really involving anybody. And they have a tendency to concentrate only on the big cases, which they think are very, very important. I don't debate their importance. I think these big cases are important. But it is a fact that these "little" cases, these tedious cases that clients bring to the office, are very, very important to the clients, or else they wouldn't bring them.

Who saved all these legal services programs? Who saved DNA from attacks by critics? The people who really saved DNA in its struggle were those individuals with the little cases, the tedious cases, the cases that weren't worth an attorney's time. These were the people who went back out into the community and told other people, "I had this case; I had this problem. I went to DNA, and they have some attorneys and some young Navajo activists. They solved my problem. They're a great bunch of people." These are the people who saved the legal services program. They will continue to save the legal services program. The big case might get the legal services program into trouble, but it's not the one that saves the program. It's the cases that were worked on for the little people that will save the program.

SC. And those cases are mostly handled by the paraprofessionals.

PZ. Right. Those cases are taken by the tribal court advocates.

SC. An interesting point you've made here is that in a selection of what cases are important, perhaps OEO, the Native American Rights Fund, and the universities only think in terms of Supreme Court cases. From what you've said here, I get the impression that even the small cases, Navajo against Navajo, are very important to the evolution of Navajo common law.

PZ. When we think about "important cases," I wonder whether these cases are important to the lawyers, or important to the clients. At DNA we feel that every case that comes through the door is important. We like for our lawyers and advocates to look at all our cases that way. And I know it's hard for the lawyers, because they have a tendency to think that little-bitty cases don't deserve their attention. I think notions like this should be erased from their minds, because every little case helps somebody. Every little case helps in the development of the law.

SC. Here on the Reservation, all these little cases have implications for the way the law is going. It's still developing here.

LJ. If a professional association is formed, what do you think the effects of it will be upon the practices of the tribal court advocates on the Reservation?

PZ. I would like to see a Navajo Bar Association take the same functions as the state bar. I think that the state bar assocations in this country are very, very strong. They have a lot of say-so about who practices law in the states. They receive grants to do certain things with the people, and I think that if a Navajo Bar Association is formed, it should set rules and regulations, and maybe even tests, as far as who practices law in Tribal Court. It should also receive grants through the federal government, the Tribe, OEO, foundations, private people, and be able to enhance the tribal laws. I think this Navajo Bar Association could become a very strong organization. I think it should be an independent organization, composed of private people, and have nothing to do with the Tribal government.

LJ. What do you think about the bar assocation allowing non-Navajos or non-Indians or even professionals to become members of the association?

PZ. I think the bar association should give tests to people to practice law in the Tribal Court. One of these tests would be the ability to speak Navajo, so if a professional Navajo cannot speak Navajo, he'll flunk his tests. We won't allow people who don't qualify on these tests to practice law in Tribal Court. This is what the states have done. If I want to practice law in the state of Arizona, they bring me in and say I've got to have language ability of a certain level. This is all set by the state. I'd walk into that ring and probably flunk. Why couldn't the Navajos do the same thing? We've got to say, "You've got to understand Navajo common law. You've got to be able to speak Navajo, because most of your clients are going to feel more comfortable speaking Navajo, and solving and listening to these problems in Navajo." The other thing is that the tribal judges are lay judges; they're not professional attorneys or legally trained, so I think we have to take that into consideration. We must be able to operate with what we have. This means that anyone who wants to practice law in Tribal Court would have to speak Navajo.

LJ. Do you think that Navajo tribal judges should be required to be members of the Navajo Bar Association?

PZ. I think they should. I think the bar association should have a strong say-so as to who's appointed to the bench.

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INTERVIEW WITH LEONARD B. JIMSON

Navajo Lay Advocate

SC. These are interviews of the Ramah Bilingual Education Project with Navajo professionals in the Navajo legal and judicial system. I'm talking with Leonard Jimson. Leonard is twenty-five years old, Navajo Indian, and is married, with a wife and two children. They are residing at Crownpoint, New Mexico. Leonard, we would like you to tell our listeners a little about your early childhood on the Reservation, and how it was that you came to be interested in the profession of Navajo law. First of all, where were you brought up on the Reservation?

LJ. Well, actually, I wasn't brought up on the reservation. I was brought up in the community of Mariano Lake, which is right outside the reservation, within the checkerboard area.

SC. In the checkerboard area?

LJ. Right.

SC. What were the circumstances? How were you raised?

LJ. I was raised pretty traditionally, I think, looking back. My father was uneducated, never went to school. My mother went as far as about the tenth grade, but that never really had much to do with our home until, maybe, my father and mother left each other.

SC. Did you live at a sheep camp?

LJ. I always lived in a hogan from the time I was born. I was born in a hogan. I always lived in a hogan until I was about fifteen years old.

SC. Did you watch the sheep? Herd the sheep?

LJ. I started herding sheep when I was about four years old. My mother always tells me that I would cry if she wouldn't allow me to herd sheep with my brother, my older brother. And I remember herding sheep by and around the community of Mariano Lake; and also I remember herding sheep during the winter in our winter camp, out towards Dalton Pass.

SC. Did you speak any English when you were growing up?

LJ. Well, I didn't start school until I was about seven or eight. Up to that time, perhaps I spoke only about ten words in English, and I only knew those because I had older brothers and sisters who were in school.

SC. What school did you go to?

LJ. I started out at Mariano Lake. I spent about a year and a half there, and then I was transferred from there to Crownpoint Boarding School, where I spent about four months. And from there on I was transferred or I was enrolled at Rehoboth Mission School by my parents.

SC. That's a private mission school?

LJ. That's correct.

SC. Did you have a chance in school to learn very much about Navajo culture?

LJ. None whatsoever.

SC. Did the school faculty encourage you to speak Navajo and to learn about Navajo culture?

LJ. No, as a matter of fact, they discouraged us from talking Navajo, not only the faculty, but also the other personnel working in the dormitory and working in the kitchen, and people who worked on the industrial staff.

SC. How did they do this?

LJ. Well, I remember one instance where I was talking Navajo with another student while eating; and one of the school personnel who was sitting at our table scolded us for talking Navajo, and later we were punished for speaking Navajo.

SC. How were you punished?

LJ. Our punishment consisted of us being confined to our rooms. This was when I was a junior in high school.

We were confined to our room for a period of time, and we were not allowed to go back to the dining hall unless we apologized. But I never apologized, and they just allowed me to go back to the dining hall.

SC. How long did you stay as a student at the mission school?

LJ. Well, when I left Crownpoint I was in the second grade, but when I got to Rehoboth I had to take second grade all over again. I never figured that out, but I was fortunate through the fact that I took fifth and sixth grades in one year; so I sort of made up for that one year that I lost, and altogether I spent ten years at Rehoboth Mission School.

SC. So, after Rehoboth Mission School, did you go back to the Reservation to work?

LJ. I worked for the NYC Program.

SC. What's that?

LJ. Neighborhood Youth Corps in Crownpoint, following my graduation at Rehoboth High School.

SC. Where did you work then?

LJ. I worked with the Employment Assistance under the BIA. Sort of like an interpreter-clerk.

SC. And did you go to college?

LJ. That following fall, I enrolled at University of New Mexico, and I spent two years there. I left. The last semester I attended UNM was in the spring of 1968 on a full-time basis.

SC. So, you went to two years of college?

LJ. Uh-huh.

SC. It sounds to me, then, like you were raised in childhood as a traditional Navajo, but then you spent a long time away in mission school and in college. Did this affect the way you could speak Navajo, or did you forget about Navajo culture?

LJ. Like I said earlier, when I started to school, I only knew about ten words in English, but after having gone to Rehoboth for ten years, and after having attended UNM for two years, I had practically forgotten the Navajo language; and it wasn't until after I started working for DNA that I started to sort of relearn the Navajo language. I never thought very much about the Navajo language or the Navajo culture up till the time I started working for DNA.

SC. What is DNA?

LJ. DNA is three letters which are short for Dinebeiina Nahiilna Be Agaditahe, which means the revitalization of the Navajo's economic life. Actually, it's a legal aid service funded by OEO to serve the Navajos on the Reservation, in the checkerboard area, and also any other indigents who qualify financially.

SC. But you're not an attorney, Leonard. What did you do for DNA?

LJ. To begin with, I functioned as interpreter-investigator, although it's sort of misleading, because I represented Navajo clients before BIA welfare. Occasionally, I handled Social Security cases, veterans' benefit cases, and also occasionally served as interpreter in State and Federal Court, and also appeared occasionally in Magistrate's Court in Gallup.

SC. As a representative of Navajo people with their legal problems.

LJ. Yes.

SC. What did you learn about law on the Navajo Reservation?

LJ. I learned a great deal during the time that I was working for DNA, not only about law among the Navajos and how it affected them. Also, I learned a great deal about the state law. The law on the Reservation is not as well developed as state and federal law. It's still in a sort of primitive stage. I think that most of the earlier laws developed are in the criminal or misdemeanor area. There's not a great deal of law governing civil matters, torts, and things like that.

SC. When you say developed, do you mean written down, or what do you mean by that?

LJ. Well, the Navajo Tribal Law and Order Code, as far as I can understand, was prepared by the BIA or was adopted almost entirely from the BIA or the federal.

SC. You mean to say that the people who wrote the code originally did not look at Navajo law or Navajo tradition?

LJ. I don't believe they did. Otherwise, I think there might have been some changes, or there might have been included in the code some of the practices of the Navajos that deal with criminal matters. As it is, you know, it's obvious that most of the things that are included in the Law and Order Code are all pretty well identical with federal and state regulations.

SC. But do Navajo people have different ways for resolving disputes and problems between themselves, different from the state and federal regulations?

LJ. I think they do. I don't believe, you know, that it's dying out. From what I read, and from what I've heard and seen, and from my experience as a DNA advocate, I've known people who have had criminal problems that were resolved in substantially different ways from the methods used in the Tribal Courts.

SC. Can you give us an example of this?

LJ. I had a client who was charged with assault and battery. The complaining witness was an old man who was related to my client. The old man filed a criminal complaint for assault and battery, but actually he didn't want my client to go to jail. All he wanted to do was have the client come into court and apologize in a way so that they could remain friends, and so that if there was any hard feelings between the two it could be aired out.

SC. Is that the Navajo way of doing things?

LJ. I think it is.

SC   But that doesn't sound like the kind of law that they have outside of the Navajo Reservation. Do you think that it still should be considered to be the Navajo way of doing things?

LJ.   Yes, I certainly think that they ought to have a place among our laws, because Navajos, I think, are basically inclined to be more humane with each other, and treat one another more as brothers, as clansman or relatives, than outside, or other societies. And I think, then, this way it keeps the people closer together, and also I think it's a good method of solving a lot of the disputes that people have.

SC.   When you were growing up on the Navajo Reservation and people in your family, or your neighbors, had arguments between each other, do you recall how they resolved their problems?

LJ.   I never did pay very much attention to it. I sat down many times and tried to think back on some of the things that I lived through, but I think I have forgotten most of it. I know that I can't mention any specific instances, but I remember the people getting together to discuss problems.

SC.   So they didn't take all the problems to the police or to the court then?

LJ.   No, as far as I know. The first time I ever heard of the Tribal Court or anybody going to court was when I was about thirteen years old, when a neighbor of ours filed a complaint against my uncle's wife. That was the first time that I ever heard of the court, or someone going to court.

SC.   But this does not mean that the people where you lived, in Mariano Lake, did not have a law From what you say, they seem to have law in that community. What kind of law was it?

LJ.   Well, it was just probably mostly day-to-day traditional ways of handling problems, the traditional ways of approaching problem resolving and disputes. I don't know the way. I really can't say from my own personal experience who assumed the responsibility for handling of these problems, but I know that there were people around the community who handled some of these problems and tried to resolve some of them.

SC. But, is it bad, what you think of the Navajo law? Was it a bad kind of law?

LJ. No, I don't think so. I can't say how it can be bad. As a matter of fact, in comparing some of the methods of resolving these disputes with the Law and Order Code as I see it today, I think that the traditional way was a much more sensible way of solving some of these disputes.

SC. I've heard people say that it's important for the Navajo people to take into their Tribal Code and their Tribal Courts the same laws they have in Arizona and New Mexico and other places, and not their own laws, because they say that that's the only way that the Navajo people can learn to live under those laws when they leave the Reservation, so that it won't confuse Navajo people. Do you agree with this point of view?

LJ. I think the transition of the Navajo from his traditional way of life to that of the dominant society may inevitably happen. I don't know how long this transition will take, but I think that in the meantime, we have to continue to live and act by our own beliefs, and by our own methods of resolving disputes, and things like that. They're important, in that they give us something to hold on to. If we just immediately take off everything from the society, I think it's just going to destroy the Navajo. While, if we continue to live by our own ways, our own beliefs and our own practices will make the change a lot smoother, a lot easier. I think that basically the Navajo and the Anglo people see right from wrong almost identically, but it's just the approach and the method of handling that differ; and this is where I think that some of the conflict comes in.

SC. You mean to say, Leonard, that Navajo people should develop their own laws, have their own laws in the Court, that relate to the way they do things, and the way they think they should behave?

LJ. Certainly, because that would be a better way of taking care of the problem than bringing in solutions that are foreign to the people. I think if you have a court and also laws that relate to the people themselves, their way of thinking is going to be much more effective when dealing with specific situations, than bringing in something that's foreign and that cannot be understood and effectively used.

SC. You mean that the law should relate to the way people live day to day and should help them solve their problems?

LJ. Right. I think that should be the purpose of the law. If it's something else, then it's not going to work.

SC. You know, what you say is very interesting, because in the old days, back in England and in Europe, when the law which is now the American law was first being developed, what people were doing was writing down the ways that people handled their problems and resolved their problems, the merchants, and the common people, and all the people there; and that came to be the common law. So maybe Navajo people could do the same thing.

LJ. There, it's unfortunate that the Navajos never developed a written language. Otherwise, a lot of this could have been written down and kept, and I'm sure it would have been in practice today, a lot more than it is.

SC. Do you think that it's too late to change the law now for the Navajos?

LJ. No, I don't think so. I think there are enough Navajos around who still are familiar with this traditional way of life. And I think there are still enough people around who can identify with it. And I think that if it's taught to the younger people in school, then I think it can abide, and that it can be developed into a written common law. I don't think it's too late yet.

SC. Leonard, let's take a typical day in the life of a Navajo lay advocate. What would that be like?

LJ. A typical day for a Tribal Court Advocate would probably include handling civil and criminal cases in the Tribal Court. Perhaps it would involve discussing some civil matters with clients that come into the office, or else, it may include handling a welfare problem, a Social Security problem, a veteran's benefit problem. It may include other consumer problems, involving pawn or a conditional sales contract, which is for purchasing automobiles or other appliances for the home.

SC. Tell us about a case that you handled.

LJ. Well, one interesting case that I handled involved an old man who was in the Public Health Service Hospital in Crownpoint. One of his sons was very concerned about the property that he had. He told me that the doctors at the Public Health Service Hospital had told him that they didn't expect his father to live very long. His main concern was his stepmother, who was a chronic alcoholic. He was afraid that when his father died his stepmother would sell all the cattle, and get rid of all the jewelry that his father had for many, many years. He was afraid that his stepmother would get rid of two vehicles that he had. He was afraid that his stepmother would get rid of all the livestock and perhaps the grazing permit which they held jointly with their stepmother. He wanted me to go over to see his father and prepare a will for him. He thought that in this way, at least not all the property that his father had would be lost. He also had a couple of ceremonial medicine bags that he said were prepared for him, but he told me that his father had the ceremonial medicine bags and he was afraid that they would get lost or that the stepmother might give them away to some relative of her own.

SC. Well, how did you help him, Leonard?

LJ. I went over to the hospital several times and talked to this old man, but from talking to him, and from the medical report on him, I considered that it was impossible for me to get a legitimate will of any sort from this man.

SC. Why was that?

LJ. Because, just talking to him, I got the idea that he didn't know anything that he owned, and besides, I told him what a will was for and what a will was, and it seemed like he didn't want to make a will.

SC. What is a will, Leonard, for our listeners?

LJ. A will is a statement or an affidavit made by an individual wherein he sets forth his wishes concerning the distribution of the property that he owns or that he might have in the future. He states what he wants to have done, maybe, with his livestock, where he wants his livestock to go, who he wants to have his livestock. If he has some jewelry, he might say, "I want my brother or my sister or my grandchildren or somebody else to have this jewelry," and this is essentially what a will is.

SC. Does he sign this piece of paper?

LJ. Well, in tribal custom or in tradition, a will is not written. It's just a statement made in the presence of one or more people. But in the Anglo society, it's signed by the person who makes the will and at least two other people who can state that they knew that the person who made the will was sane or else that he had control of his mind, that he knew what he was doing, and knew what he was talking about.

SC. Do you think the Tribal Court accepts both kinds of will? The written will, and the verbal will?

LJ. I have never handled a case where there was a custom will, but if the Tribal Judges follow the Navajo Tribal Code, they should, because the Tribal Code specifically holds custom will over written will. But I have handled cases where there was a written will, and the Tribal Court did accept the written will.

SC. So how did you help this person?

LJ. Well, since I was unable to obtain a will from the old man, who subsequently died, I had my client, his son, appointed as administrator, or appointed to take care of the property that his father left behind, which included cattle, sheep, some jewelry, saddles, bridles, a couple of vehicles.

SC. What does it mean to be an administrator?

LJ. An administrator is someone who applies to the Court and is appointed by the Court to take care of the property that a deceased person leaves behind. He oversees the distribution of the property. He submits to the Court a list of all the property that the deceased owned, and it is his duty to notify all the people who might be entitled to receive a share of the property that was left behind.

SC. So he has a legal responsibility, given to him by the Court?

LJ That is right.

SC. Let's talk about another problem. Many times a Navajo is arrested by a Navajo policeman for a crime. How can the Navajo lay advocate help that person?

LJ The Navajo lay advocate can help this person by getting him out of jail, and also by appearing with him when he comes before the Judge.

SC. What is it that the Judge will ask?

LJ. The Judge will read the complaint to him and explain the complaint to him.

SC. What does the complaint say?

LJ. The complaint says that this individual has committed a wrong or he has broken a law of the Navajo Tribe.

SC. Is this different from a complaint or a piece of paper that a man would put in against his neighbor to get damages if his neighbor's cow came in and ate some of his vegetables in his garden?

LJ. Yes, this would be different, because, in the first place, the law which this individual supposedly broke deals with a jail sentence. If a person is found to have broken this law, he is placed in jail, or made to pay a fine to the Navajo Tribe. While, in the second place, the person against whom the complaint or the piece of paper has been filed is not concerned about going to jail if the Court finds that his cow did eat this other person's vegetables. The Court will only require him to pay for the vegetables that the cow ate. He would not be made to go to jail or pay a fine to the Court or to the Navajo Tribe.

SC. You mean to say that some kinds of actions in the Court are brought by the Tribe for violations of its laws, and other kinds are brought by individual members of the Navajo Tribe or other people for private matters and to resolve private disputes?

LJ. Yes, that is right. Most of the actions which are brought by the Navajo Tribe deal with the Law and Order Code which is in the Tribal Code. These statutes or these laws have to do with sentencing or putting a man in jail, while the other is only between two individuals and does not involve the Tribe at all.

SC. Does a policeman who arrests a person represent himself only, or does he represent the Navajo Tribe?

LJ. Since he is a Navajo policeman, working for the Navajo Tribe, he is working to enforce the laws of the Navajo Tribe, so when he files a complaint against an individual, he is representing the Navajo Tribe.

SC. Now, the Judge gets the policeman's and the Navajo Tribe's side of the story about the wrong that they say the man did. What does the Navajo lay advocate do?

LJ. The Navajo advocate tries to get only the facts out before the Judge, especially the facts that are most favorable to the client that he is representing.

SC. Can a Navajo lay advocate represent the Navajo Tribe?

LJ. Lay advocates do represent the Navajo Tribe, but they are usually called prosecutors.

SC. So it seems, then, that the Navajo Tribe, through its policemen and maybe its prosecutors and its witnesses who represent its side of the story to the Judge is not the only one to have a chance to do this. The person who is arrested will also have an opportunity to present his side of the story to the Judge. After this happens, what is the next step?

LJ. The next step involves the prosecutor summarizing, for he has tried to prove guilt with the testimony of the Navajo policeman and his witnesses. He tries to convince the Judge that the individual has broken a law and requests or asks the Judge to issue a sentence against the individual which may involve sending the man to jail or having to pay a fine. At the conclusion of these statements, a lay advocate representing the individual also gets an opportunity to try to convince the Judge the prosecution, through the prosecutor and the Navajo policeman and the witnesses, have not proven anything, that the person that he is representing is not guilty, and that he should be found innocent; and at the conclusion of this, the Judge makes his ruling. He makes his decision. He tells the prosecutor, the Navajo policeman, the individual, and the lay advocate who is representing him what his decision is.

SC. Suppose he finds the client guilty, the defendant guilty? Can the lay advocate do anything else?

LJ. There are several things that he can do. He can take it to a higher court.

SC. Where is the higher court?

LJ. This higher court, called the Court of Appeals, is in Window Rock.

SC. Who are the judges there?

LJ. There are three judges there. There is a Chief Justice, and also a couple of Trial Judges, who are chosen by the Chief Justice from other districts than the one where the person was found guilty. The Court of Appeals holds a whole new hearing and they hear all the evidence and the testimonies of all the people again.

SC. All over again?

LJ. All over again. It's a whole new trial.

SC. It sounds like a Navajo lay advocate can do very much to help a person who is arrested by the police.

LJ. There is a great deal that he can do.

SC. It seems that he has a lot of information about the law that most people do not have.

LJ. That's true. A lot of the information that he has is learned from either the DNA Legal Aid Services, or the Navajo Legal Aid Services, and the attorneys that they work with.

SC. Do you think that Navajo lay advocate career would be something that a high school student should think about pursuing?

LJ. Very definitely, because at the present time there are very few lay advocates that are working privately. There is need for more of these lay advocates so that more people who go into the Tribal Court can have representation, and this will improve the judicial system of the Navajo Tribe overall.

SC. If a Navajo high school student wants to become a lay advocate, must he go to law school?

LJ. No, it is not necessary that he go to law school, although I would recommend that high school students, particularly those who are graduating, consider going to law school very seriously, because eventually the role of the lay advocate will be taken over by the Navajos who go to law school and come out as lawyers.

SC. What kind of course preparation should a Navajo high school student have, in his own high school, to prepare him if he wants to go become a Navajo lay advocate after he graduates?

LJ. The Navajo student who wishes to pursue a career in lay advocacy should learn the English language very well, and, at the same time, retain the Navajo language, because it's very important that he speak both languages fluently. He has to learn how to speak English very well, and be able to write very well, because in order to go into the Tribal Court a person must be able to do a lot of reading. He has to be able to write complaints and things like that, and he should go and visit the Navajo Tribal Court, to try to learn as much as he can about the Navajo Tribal Court system. He should try to learn about the various departments of the Navajo Tribal Government and how they function, and what their purposes are; and in this way, he knows what the Navajo Tribal Government is for, what the Judicial Branch is for. And, also, another important thing that he should learn or know about is the traditional beliefs and practices of the Navajo people, because a lot of the clients or people that he will assist still believe in the traditional practices of the Navajo people.

SC. And, also, Leonard, shouldn't we tell our listeners that Navajo tradition and Navajo culture are part of the Navajo law?

LJ. I would even go further than that, because, according to the Navajo Tribal Code, the Navajo tribal traditions and customs have priority over other laws, such as state laws, and if custom and tradition can be proven in certain instances, this will be applied to any situation.

SC. You mean that Navajo people can still guide their behavior by Navajo custom and Navajo tradition?

LJ. That is what the Navajo Tribal Code provides for.

SC. As a Navajo who grew up in a hogan and later went to school and went to missionary school, do you think that working as a Navajo lay advocate in the Tribal Court has given you a new way of looking at Navajo tradition and how Navajo people can solve their problems?

LJ. Yes, I think so, because during the period of time that I was in school there was always somebody else that was telling me something about what they felt I should know; or there was always somebody else telling me what they thought was best for me. It was somebody else that was telling me how the Navajo people were, as they saw it. But after I started working for DNA, I got to work with the Navajos and became involved in many of the problems that they had. For instance, clients would come into the office and bring their problems to me; and in most instances they had an idea of how they wanted their problem to be solved, and in that way I got to know some of their ways of thinking, some of their beliefs. And working on some of these problems, I came in contact with many of the agencies that are supposed to be benefiting the Navajo people but aren't. There are so many things that I find are wrong. For instance, the BIA Welfare are supposed to be assisting indigent Navajo families but in many instances, the BIA Welfare are denying assistance to these families because the families own livestock; or perhaps they say that there are jobs available on railroads in states far, far away. In this way, it sort of made me think, and made me directly involved in many of the problems that we are having. And in this way, it just changed my whole thinking. Before, I never thought about all these things. It never bothered me at all. But after I started working with these problems and talking to

Navajos, listening to what they believe, listening to what they have in their mind, it just changed my whole outlook, my life.